Supreme Court, U.S.
FILED

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No._____

IN THE

Supreme Court of the United States

October Term 2000

L.T. BRANT,
Petitioner,
v.
EARLE LILLY, PIRE & LILLY, P.C., DEPELCHIN CHILDREN'S CENTER, BAYLOR COLLAGE of MEDICINE, EARNEST KENDRICK, MICHAEL D. COX, JEAN GUEZ, BARBARA TAYLOR, LUISA MARIA ACEVEDE LOHNER, ANN M. HODGES AND JOEL A. NASS,
Respondent.

On Petition For Writ of Certiorari To The Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Does the award of $100,000 in punitive fines against a plaintiff's lawyer, as a sanction for filing frivolous pleadings, have a chilling effect on the First Amendment right of the people to petition the Government for the redress of grievances and the Fifth Amendment right to retain counsel in a civil case?

(2) Does the Due Process / Equal Protection clause of the Fourteenth Amendment prohibit imposing a punitive fine against a lawyer under Rule 13, Tex. R. Civ. P., that is 200 times greater than the maximum amount promulgated by the Texas Legislature?

(3) Does the imposition of a punitive fine that is 200 times greater than the maximum amount promulgated by the Texas Legislature violate the Eighth Amendment proscription against excessive fines?

(4) Does a judgment ordering Petitioner to pay a punitive fine to individuals, instead of the state, violate the Due Process clause of the Fourteenth Amendment? *Bajakajian* infra.

(5) Is a judgment imposing a punitive fine upon Petitioner unconstitutionally vague in violation of the Due Process clause of the Fourteenth Amendment when it is impossible to ascertain from the four corners of the judgment who are the judgment creditors and how the fine should be apportioned among them?

(6) Does the state court's violation of the federal "snapshot rule" in imposing sanctions against a lawyer violate the Due Process clause of the Fourteenth Amendment?

(7) Does the Due Process clause of the Fourteenth Amendment prohibit the imposition of punitive fines against a lawyer under Rule 13, Tex. R. Civ. P. for conduct of co-counsel or for conduct that the sanctioned lawyer did not engage in?

(8) Does the failure of the Supreme Court of Texas to correct a line of state cases (including this case) and to bring same into compliance with this Honorable Court's decisions in *Gompers* and *Bagwell*, violate Petitioner's Due Process rights under the Fourteenth Amendment?

(9) Was Petitioner impermissibly denied basic procedural due process protections under the Fifth, Sixth and Fourteenth Amendment, including the right to trial by jury and proof beyond a reasonable doubt, before punitive fines of $100,000 were imposed against him?

(10) Was Petitioner subjected to multiple and/or successive punishments for the same conduct in violation of his Double Jeopardy protections under the Fifth and Fourteenth Amendments when Petitioner was: (i) fined $500 for criminal contempt, (ii) then acquitted in a separate criminal contempt proceeding, and (iii) then fined $100,000 for the same conduct?

PARTIES

Petitioner: L.T. Bradt

Respondents:

Earle Lilly
Piro & Lilly, P.C.
Depelchin Children's Center
Baylor College of Medicine
Ernest Kendrick
Jean Guez
Barbara Taylor
Luisa Maria Acevedo Lohner
Ann M. Hodges
Michael D. Cox [1]
Judy Sebek [2]

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[1] Michael D. Cox died during the pendency of this appeal in State court. His estate has not formally substituted in as a party to this appeal.

[2] Judy Metzger Sebek settled with Petitioner while this case was pending in the First Court of Appeals and she is, therefore, no longer a party to this appeal. She is identified for the sake of completeness.

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To the Honorable Chief Justice of the United States Supreme Court and to the Associate Justices of the United States Supreme Court:

L.T. Bradt ("Petitioner") respectfully prays that a Writ of Certiorari issue to review the decision of the Supreme Court of Texas, which declined to review the decision of the First Court of Appeals of Texas which affirmed the trial court's judgment imposing a $100,000 punitive fine under Rule 13, Tex. R. Civ. P. against Petitioner.

REPORTS OF OPINIONS

The judgment of the 234th Judicial District Court of Harris County, Texas dated April 8, 1996, awarding the punitive fines is set forth in Appendix A.

The Opinion of the First Court of Appeals of Texas dated January 13, 2000, affirming the trial court's award of punitive fines, is reported at 14 S.W.3d 756, and is set forth in Appendix B.

The Order of the First Court of Appeals of Texas dated April 7, 2000, denying Petitioner's motion for rehearing, is set forth in Appendix C.

The Order of the Supreme Court of Texas, denying the Petition for Review dated August 10, 2000, is not reported and is set forth in Appendix D.

The Order of the Supreme Court of Texas, denying rehearing of the Petition for Review dated September 28, 2000 is set forth in Appendix E.

The Show Cause Order, requiring Petitioner to present and show cause why he should not be held in contempt dated August 18, 1992, is set forth in Appendix F.

The Order acquitting Petitioner of contempt dated December 4, 1992, is set forth in Appendix G.

The Texas Attorney General's Medicaid Fraud Control Unit's Investigative Report for Prosecution Analysis is contained in Appendix I.

JURISDICTION

The Supreme Court of Texas denied Petitioner's Motion for Rehearing of the Denial of the Petition for Review on September 28, 2000. That Order is set forth in Appendix E. The Supreme Court of Texas denied Petitioner's Petition for Review on August 10, 2000. That Order is set forth in Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

STATUTES INVOLVED

The following statutes are involved in this case: Rule 13 and Rule 215, Texas Rules of Civil Procedure; Sections 21.001 and 21.002, Texas Government Code; Section 9.001, et seq. and Section 10.001, et seq., Texas Civil Practice and Remedies Code. These are set forth in Appendix H.

The following Constitutional provisions are involved in this case: First, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. These are set forth in Appendix H.

REASONS TO GRANT THIS PETITION

If allowed to stand, this published opinion will have a *chilling* effect on the First Amendment rights of the citizens of Texas who champion unpopular causes to retain legal counsel and thereby to petition the Government for the redress of grievances. The Supreme Court of Texas, in denying the Petition for Review, affirmed the decision of the First Court of Appeals, which decided important questions of federal law in ways that conflict with the decisions of this Honorable Court and which decided an important question of federal law that has not been, but should be settled by this Honorable Court. As set forth herein, the decision of the First Court of Appeals directly

conflicts with the following decisions of this Honorable Court, among others: *United States v. Bajakajian*, 524 U.S. 321 (1998); *Hudson v. United States*, 522 U.S. 93 (1997); *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994); *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Bankers Trust Co. v. Blodgett*, 260 U.S. 647 (1923) and *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911).

This case involves the important unanswered questions of constitutional law of whether the assessment of $100,000 in punitive fines against Petitioner, and filing a frivolous pleading violates the First Amendment right of the people to petition the Government for a redress of grievances, and the Eighth Amendment proscription against excessive fines, and further, whether the award of punitive fines violates the jurisdictional limit of the Texas Rules of Civil Procedure.

This case presents the proposition of law that a party and his attorney may be subjected to serious punitive fines by the state courts of Texas, without fundamental constitutional due process protections. The trial court and the Court of Appeals applied the wrong burden of proof, impermissibly denied Petitioner the right to a jury trial and denied Petitioner *due process* in order to impose punitive fines. Although not couched explicitly in such terms, the opinion of the First Court of Appeals is also an unconstitutional *ex post facto* application of § 10.004 of Tex. Civ. Prac. & Rem. Code in violation of the Due Process Clause of the Fourteenth Amendment.[1]

If the concept of the law as applied by the Texas courts in this case had been in place in the '60's, we would never have experienced the civil rights movement or the privileges that we

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[1] As shown in Appendix H, Section 10.001, et seq. *Tex. Civ. Prac. & Rem. Code* was enacted in 1995 and was made effective only to causes of action filed on or after September 1, 1995.

enjoy from it today. If this concept of the law had been in place in the '50's, a lawsuit challenging *Plessy v. Ferguson*, 163 U.S. 537 (1896), would have been groundless and filed in bad faith, instead of being the product of the legal genius of Thurgood Marshall as reflected in *Brown v. Board of Education*, 349 U.S. 294 (1955).

These constitutional errors raise issues of fundamental importance to the jurisprudence of Texas and this Country, and merit correction by this Honorable Court.

STATEMENT OF THE CASE

In 1990, Mark Metzger, acting through his previous attorney, James Drexler, filed suit in the 269TH District Court of Harris County, Texas, against Respondents herein. In 1991, Petitioner substituted in as Metzger's attorney and filed several amended pleadings on behalf of Metzger. The pleadings were substantially similar to those filed by attorney Drexler but did include additional causes of action. Further, some of the material allegations raised by the pleadings filed in this case by Petitioner are virtually identical to the allegations of criminal conduct found by the Texas Attorney General's Medicaid Fraud Control Unit's Investigative report contained in Appendix I and involved many of the Respondents herein.

Metzger's trial to a jury occurred in 1992 and a directed verdict was granted in favor of the Respondents in May, 1992. During trial, Petitioner was twice held in contempt by the trial court. See *Metzger v. Sebek*, 892 S.W.2d 20 (Tex. App. -- Houston [1st Dist.] 1994, writ denied, cert. denied). Petitioner paid the $500 fine on one of the contempts and was subsequently acquitted on the other contempt. See Appendix G and *Bradt v. West*, 892 S.W.2d 56, 64 (Tex. App. – Houston [1st Dist.] 1994, writ denied).

Following trial, Respondents filed motions for sanctions under Rule 13, Tex. R. Civ. P., claiming that Metzger and his counsel had filed frivolous pleadings. Thereafter, sanctions in

the amount of $994,000 were awarded against Metzger, Petitioner, and one of Petitioner's co-counsel - Joe Alfred Izen, Jr. Immediately after the trial ended in 1992, the trial court issued the Show Cause Order (Appendix F) commanding Petitioner to appear and show cause why he should not be held in criminal contempt for his conduct during the trial. This contempt was sought by the Respondents. After a full trial on the merits of the second contempt, Petitioner was acquitted. Appendix G.

In the first appeal the $994,000 sanction was reversed and rendered as against Petitioner's co-counsel, Joe Alfred Izen, Jr.; reversed and remanded as to Petitioner; and remanded only for determination of the amount of sanctions as to Metzger. See *Metzger v. Sebek*, 892 S.W.2d 20 (Tex. App. – Houston [1ST Dist.] 1994, writ denied, cert. denied).

Petitioner's amended pleadings alleged what he believed was mental health care fraud that was effectuated through false allegations of abuse by Respondents. Such pleadings also alleged fraud against the Respondent mental health care professionals in billing Metzger and his insurance company - fraud which was similar to and clearly documented by the Attorney General's Medicare Fraud Control Unit Report. (See Appendix I) The allegations of fraud were similar in time, conduct and parties as those documented in the Medicare Fraud Control Unit Report.

Following reversal and remand, in April, 1996, the trial court conducted a second hearing on Respondents' Motions for Sanctions under Rule 13, Tex. R. Civ. P.. Although Metzger had previously paid a jury fee and demanded a trial by jury before the first trial, both Metzger and Petitioner were denied a jury trial in the determination of sanctions. At trial of the sanctions motions, Petitioner and Metzger were each assessed $100,000 in punitive fines ($200,000 total) for violating Rule 13, Tex. R. Civ. P.. (Appendix A). Metzger discharged the sanctions against him in bankruptcy and did not appeal.

The punitive fines that were imposed under Rule 13, Tex. R. Civ. P., were ostensibly compensation for the Respondents. (Appendix A and B). Petitioner appealed to the First Court of Appeals, which affirmed the trial court, and then to the Supreme Court of Texas, which denied, without written opinion, the Petition for Review. All United States constitutional issues raised in this Application were raised in Petitioner's pleadings before the First Court of Appeals and before the Supreme Court of Texas.

ARGUMENT AND AUTHORITY

QUESTION ONE: Does the award of $100,000 in punitive fines against a plaintiff's lawyer, as a sanction for filing frivolous pleadings, have a chilling effect on the First Amendment right of the people to petition the Government for the redress of grievances and the Fifth Amendment right to retain counsel in a civil case?

The First Amendment of the United States Constitution protects litigants and guarantees citizens the right to access the courts and to petition the Government for a redress of grievances through the courts. *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142 (1907); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1974). The First Amendment is made binding upon the states by the Fourteenth Amendment. Further, the Fifth Amendment has been construed by the Fifth Circuit to include the right to retain counsel in a civil case. *Potashnick v. Port City Construction, Inc.*, 609 F.2d 1101, 1118 (5th Cir. 1980). These fundamental constitutional protections are emasculated by the threat of unlimited punitive fines imposed against lawyers who champion unpopular causes or attack the politically influential establishment. The effect of the upholding of these "professional death penalty" sanctions in a published opinion has had a chilling effect upon the rights of litigants in Texas, and their ability to retain legal counsel in civil

cases due to the clear and ominous threat by the state courts of Texas that unlimited punitive fines may be imposed upon unpopular litigants and their counsel, without guiding principles or proper Due Process considerations.

QUESTION 2: Does the Due Process / Equal Protection clause of the Fourteenth Amendment prohibit imposing a punitive fine against a lawyer under Rule 13, Tex. R. Civ. P., that is 200 times greater than the maximum amount promulgated by the Texas Legislature?

QUESTION 3: Does the imposition of a punitive fine that is 200 times greater than the maximum amount promulgated by the Texas Legislature violate the Eighth Amendment proscription against excessive fines?

The Texas Legislature codified the courts' inherent power to punish for contempt in Section 21.002, (Texas Government Code) (Appendix H).The Texas legislature prescribed a maximum punishment of six months in jail and a $500 fine for an act of contempt in section 21.002(b), (Texas Government Code). In light of the specific language of Rule 13, requiring that violation of the rule be treated as a contempt, the proceedings against Petitioner must be in the nature of criminal contempt proceedings since he was tried (and punished) for past behavior, with no opportunity to purge.

The trial court and the Court of Appeals attempted to distinguish the cases cited by Petitioner, holding that the Rule 13 proceedings were not a contempt. The Court of Appeals, Appendix B, pages 31a - 34a, addressed Petitioner's contention that the proceedings were a contempt, with a different burden of proof and a limitation on the amount of fine that can be imposed. However, the Court of Appeals ruled that the

proceedings were not contempt proceedings. This holding violated the express requirements of Rule 13, Tex. R. Civ. P., which requires that:

> Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleadings which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, **shall be held guilty of a contempt.** If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, **shall impose an appropriate sanction available under Rule 215-2b**, upon the person who signed it, a represented party, or both. [Emphasis supplied.] (Appendix H)

Rule 215-2b, Tex. R. Civ. P., authorizes the imposition of sanctions. The Rule 215-2b, Tex. R. Civ. P., sanctions include compensatory attorneys fees in very defined circumstances - none of which are applicable here - as well as the power to punish for contempt. Other than through the court's inherent power to punish for contempt, neither Rule makes any provision for the imposition of punitive fines against an offending party.

A contempt fine is civil and remedial if it "either coerce[s] the defendant into compliance with the court's order, [or] ... compensate[s] the complainant for losses sustained." Where the fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge. Thus, a "flat, unconditional fine" totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance. *Bagwell*, 512 U.S. at 829 (quoting *United States v. Mine Workers*, 330 U.S. 258, 303-04 (1947), and *Penfield Co. of Cal. v. SEC*, 330 U.S,. 585, 590 (1947)) [2]

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[2] This fine cannot constitute compensation to the Respondents because at least 3 of the Respondents presented no evidence as to damages that they allegedly sustained as a result of Petitioner's conduct. See Question 4,

When the fine is analyzed under the seven factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 - 169 (1963), the fine unquestionably meets at least four of those factors to transform what may have been a civil proceeding into a criminal one. The fact that the fine was originally $994,000 makes this analysis even clearer.

Texas Rules Do Not Provide For Serious Punitive Fines

Although the First Court of Appeals characterized the proceedings against Petitioner as a "civil proceeding," (Appendix B, page 34a) in affirming the $100,000 sanction against Petitioner, the Court of Appeals classified the award as a "fine" ten different times (Appendix B). The Court of Appeals overruled Petitioner's point of error that the proceedings against him were at least "quasi-criminal" and agreed with the trial court to view the proceedings as civil. If this was not a contempt proceeding, then the imposition of punitive fines is not a permitted civil sanction under Rule 13 or Rule 215, Tex. R. Civ. P.. (Appendix B, page 34a; Appendix H) Such a construction of the Rules is an erroneous judicial construction of a rule of procedure that violates Petitioner's Due Process rights.

Petitioner was punished for past conduct, with no opportunity to purge; therefore, the sanction cannot be categorized as a civil coercive fine. Punitive fines are permitted in the context of Rule 13 proceedings, but only as part of contempt proceedings. Assuming, *arguendo*, that punitive fines are permitted under Rule 13, then those fines are limited by § 21.002, Texas Government Code, to a maximum of $500. Punitive fines greater than permissible under the contempt statute are not a prescribed remedy under Rule 13 or Rule 215, Tex. R. Civ. P.. (Appendix H) and, when those punitive fines are 200 times the maximum permissible fine for contempt, they must as a matter of law constitute excessive fines because they are "grossly disproportionate" to the maximum fine permitted. *United States v. Bajakajian*, 524 U.S. 321 (1998); *Hudson v. United States*, 522 U.S. 93 (1997).

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below, for cites to Record.

When he filed the pleadings in 1991 and 1992, Petitioner had no way of knowing that Rule 13 could be construed in a manner to allow the imposition of virtually unlimited punitive fines. A person is only held to know what the law is on the day that he engages in the conduct which is sought to be punished. *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), cert. denied, 466 U.S. 980. Due process requires that a person be given fair notice as to what constitutes prohibited conduct so that he may conform his conduct to the requirements of the law. *Dahlstrom*; Fifth and Fourteenth Amendments, U.S. Constitution. Since Petitioner could not have known that his conduct would subject him to punitive fines, the assessment of such a fine violates Petitioner's Due Process rights.

Under this authority, which was cited to the Supreme Court of Texas and the First Court of Appeals, the Court of Appeals erred when it decided that the proceedings against Petitioner were not in the nature of criminal contempt proceedings.

QUESTION 4: Does a judgment ordering Petitioner to pay a punitive fine to individuals, instead of the state, violate the Due Process clause of the Fourteenth Amendment?

The Punitive Fine is Not Compensation

In *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 831 (1994) this Honorable Supreme Court held that where a fine is not compensatory, it is civil only if the contemnor is afforded the opportunity to purge; and that a flat, unconditional fine of as little as $50 is criminal if the contemnor has no opportunity to purge.

While the Court of Appeals also denominated the $100,000 fine against Petitioner as "compensation," that reasoning fails because: (1) the sum bears no relation to the damages claimed by Respondents and (2) some of the Respondents, *e.g.*, Earl Lilly, Piro & Lilly, P.C. and Joel Nass, presented no evidence at the hearing on sanctions. (R.R. Sanctions hearing, pp. 12 - 13; 20, 23) Petitioner raised this lack of evidence before both the

First Court of Appeals and the Supreme Court of Texas. As they presented no evidence as to the damages that they allegedly suffered from the sanctioned conduct, those Respondents who presented no evidence cannot be compensated as a matter of law. To hold otherwise violates Petitioner's Due Process rights.

Compensatory "punitive fines" / Due Process Violation

In affirming the judgment, the First Court of Appeals categorized the proceedings as civil but denominated the sanctions as a "fine." Appendix B, page 34a. The First Court of Appeals also concluded that the $100,000 fine constituted "compensation." This categorization presents several due process considerations that merit review by this Honorable Court.

First, the Court of Appeals ignored the manner in which the trial court characterized the proceeding, which was:

> "As with any effort to determine the **intent** of an **accused**, because of the improbability of an **admission of guilt** the Court must look to circumstantial evidence. ... While some of the actions noted below are beyond the scope of **punishment** in this proceeding ..." (Appendix A, page 6a)[Emphasis supplied]

This evidences an intent by the trial court to consider scienter of the accused, i.e. the Petitioner, and thus this is clearly a criminal proceeding.

Second, as of 1992, when the *Metzger* case was tried, the State of Texas had partially abrogated the "American rule" and adopted "loser pay" for attorney's fees in personal injury litigation, but that was only in the context of § 9.001, et seq., Tex. Civ. Prac. & Rem. Code. (Appendix H) Rule 13, Tex. R. Civ. P., made no reference to compensation and could not be used for compensation. However, § 9.001, et seq., Tex. Civ. Prac. & Rem. Code, had a 90-day "safe-harbor" provision which Petitioner was never afforded. This statute could not, therefore, be used as a basis to sanction Petitioner.

On September 1, 1995, the Texas Legislature enacted Section 10.004, Tex. Civ. Prac. & Rem. Code (Appendix H) - applicable **only** to cases commenced on or after that date, and

thereby partially abrogated the "American rule." Since the offending conduct occurred no later than 1992, this constitutes an impermissible *ex post facto* application of this statute.

By considering the sanction to be compensation - a remedy not contemplated by Rule 13, the First Court of Appeals impermissibly applied either (i) the standard of § 9.012, Tex. Civ. Prac. & Rem. Code - without affording Petitioner the beneficent effect of the safe-harbor provision, or (ii) § 10.004, Tex. Civ. Prac. & Rem. Code - *ex post facto*. Either application would constitute a violation of Petitioner's due process rights under the United States Constitution.

The Due Process clause prohibits the judiciary from retroactively applying unforeseeable judicial construction of a criminal statute. *Bouie v. City of Columbia*, 378 U.S. 347, 352 - 53 (1964). A new judicial doctrine cannot be applied retroactively if it was an "unexpected and indefensible" break from existing case law, *Bouie*, 378 U.S. at 354, or if it marks a significant departure from prior case law, *i.e.*, it announces a judicial construction that imposes criminal liability for conduct not punishable under previous case law. *Marks v. United States*, 430 U.S. 188, 194 - 96 (1977).

QUESTION 5: Is a judgment imposing a punitive fine upon Petitioner unconstitutionally vague in violation of the Due Process clause of the Fourteenth Amendment when it is impossible to ascertain from the four corners of the judgment who are the judgment creditors and how the fine should be apportioned among them?

Due Process Violation - Judgment not Specific

The judgment in question (Appendix A) does not identify any defendant, except Sebek, who has settled with Petitioner. The law in Texas is that "[A] judgment must be sufficiently definite and certain to define and protect the rights of all litigants, or it should provide a definite means of ascertaining

such rights, to the end that ministerial officers can carry the judgment into execution without ascertainment of facts not therein stated." *Stewart v. USA Custom Paint & Body Shop, Inc.*, 870 S.W.2d 18, 20 (Tex. 1994). This judgment does not comply with this requirement. While this case was pending on appeal, Petitioner settled with Sebek; therefore the only defendant identified in the judgment has released any interest therein. Since there are no other "defendants" identified, the judgment lacks the specificity required by the Due Process Clause. However, the First Court of Appeals and the Supreme Court of Texas refused to correct this deficiency in the judgment, even though this error was addressed in Petitioner's Motion for Rehearing at the Court of Appeals and in Petitioner's Petition for Review to the Supreme Court of Texas. (page 46a, Appendix B) This Honorable Court has never addressed the specificity that is required in a judgment, when evaluated by the Due Process standard..

As set forth above, not all of Respondents presented evidence on their alleged damages during the hearing on sanctions. One of the trial court's specific findings for the imposition of sanctions was Petitioner's use of Metzger's perjurious affidavit, to defeat motions for summary judgment. (Appendix A, page 3a) [1] However, Petitioner addressed in his Fifth Point of Error to the First Court of Appeals and to the Supreme Court of Texas, that not all Respondents moved for summary judgment; therefore, even if the use of Metzger's perjurious affidavit could constitute grounds for sanctions, under Due Process considerations, the use of Metzger's affidavit would not support sanctions in favor of parties who had not moved for summary judgment In *GTE Communications Systems Corporation v. Tanner*, 856 S.W.2d 725 (Tex. 1993), the Supreme Court of Texas held that an attorney could not be sanctioned for using an affidavit that he did not sign.

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[1] The Order refers to the responses to the motions for summary judgment. The only substantive complaint advanced by Respondents as to those responses was that Metzger's affidavit was perjurious. Of necessity, therefore, Respondents' complaint against Petitioner was his use of Metzger's affidavit, which Petitioner did not sign.

QUESTION 6: Does the state court's violation of the federal "snapshot rule" in imposing sanctions against a lawyer violate the Due Process clause of the Fourteenth Amendment?

The law in Texas is that in deciding whether sanctions are warranted for pleadings allegedly filed in bad faith, the court must examine the law and facts available to the attorney at the time that the pleadings were filed. *See, e.g., Campos v. Ysleta General Hospital, Inc.*, 879 S.W.2d 67 (Tex. App. - El Paso 1994, writ denied). This is what is known in federal courts as the "snapshot rule." *See e.g., Federal Deposit Insurance Corporation v. Calhoun*, 34 F.3d 1291 (5th Cir. 1994). All Federal Circuits employ the snapshot rule in the context of Rule 11, Fed. R. Civ. P. sanctions. Rule 13, Tex. R. Civ. P. sanctions are the Texas equivalent of the federal Rule 11.

A person is only held to know what the law is on the day that he engages in the conduct which is sought to be punished. *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), cert. denied 466 U.S. 980. Due process requires that a person be given fair notice as to what constitutes prohibited conduct so that he may conform his conduct to the requirements of the law. *Dahlstrom*; Fifth and Fourteenth Amendments, U.S. Constitution. This is the essence of the "snapshot rule."

The trial court violated the requirement that the law be determined as of the day the offending pleadings were filed when it failed to apply cases that recognized causes of action at the time the pleadings were filed and by considering cases that were decided years after the pleadings were filed, to conclude that certain causes of action did not exist at the time the pleadings in question were filed. *See* Appendix A, Order, at pp. 4a - 5a. Every law which makes criminal an act which was innocent when done, or which inflicts a greater punishment than the law annexed to the crime when committed, is an *ex post facto* law within the prohibition of the Constitution. *Calder v. Bull*, 3 Dall. (3U.S.) 386, 390 (1798); *Ex parte Garland*, 4 Wall (71 U.S.) 333, 377 (1867); *Burgess v. Salmon*, 97 U.S. 381,

384 (1878). The constitutional prohibition may not be evaded by giving a civil form to a measure which is essentially criminal. *Bankers Trust Co. v. Blodgett*, 260 U.S. 647, 652 (1923).

Petitioner raised the violation of the "snapshot rule" in the First Court of Appeals as part of Petitioner's Fifth Point of Error; and raised it again before the Supreme Court of Texas. Instead of focusing on the impermissible determination of causes of action that were not abrogated until years later, the First Court of Appeals focused instead on the elements of the causes of action that Petitioner did not prove and ignored the fact that Petitioner was sanctioned for bringing causes of action that supposedly either did not exist or which had been abrogated by the Supreme Court. *See* Appendix B, pages 38a - 44a.

The trial court based, and the First Court of Appeals affirmed, the sanctions against Petitioner on the grounds that the causes of action asserted did not exist in law when the pleadings were filed. When Petitioner pointed out cases that proved that the asserted causes of action did exist when the pleadings were filed, both courts then conducted an in-depth analysis of the elements of such causes of action that Petitioner did not prove as a basis to assess and uphold the sanctions.

To sanction Petitioner for filing causes of action that were not abrogated until years after Petitioner filed the pleadings alleging those causes of action and for which he was sanctioned, violates Petitioner's Due Process rights.

QUESTION 7: Does the Due Process clause of the Fourteenth Amendment prohibit the imposition of punitive fines against a lawyer under Rule 13, Tex. R. Civ. P. for conduct of co-counsel or for conduct that the sanctioned lawyer did not engage in?

QUESTION 8: Does the failure of the Supreme Court of Texas to correct a line of state cases (including this case) and to bring same into compliance with this Honorable Court's decisions in *Gompers* and Bagwell, violate Petitioner's Due Process rights under the Fourteenth Amendment?

Due Process Violation - One Punishment for Multiple Acts, Some Not Supporting Sanction

Only one punishment was assessed for all of Petitioner's alleged conduct. The trial court, in assessing this amount, considered many matters for which Petitioner cannot be sanctioned, or which Petitioner did not commit. These include Plaintiff's First Amended Petition, which was signed by James Drexler; Metzger's affidavit; matters for which Petitioner paid a fine; matters alleged to constitute contempt, for which Petitioner was tried and acquitted; the alleged conduct of Joe Alfred Izen, Jr.; Metzger's suit against Judge West and others in federal court; and, causes of action that were abolished by the SupremeCourt of Texas years after the case was tried in1992.[2]&[3] Appendix A,

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[2] At Appendix B, page 45a, the First Court of Appeals refers to a suit brought in federal court against the defendants, citing *Bradt v. West*, 892 S.W.2d at page 64. At Appendix A, page 6a, the trial court referred to sanctions that were allegedly imposed against Bradt in that federal suit. However, Petitioner had nothing to do with Metzger's suit in federal court and was neither a party nor an attorney to that suit and was not sanctioned in that suit. This is reflected in *Bradt v. West*, 892 S.W.2d at page 64, where the Court of Appeals correctly notes that Metzger returned to federal court and that it was Metzger who was ordered to pay the attorney's fees and costs.

[3] The trial court noted that Petitioner could not be sanctioned for the conduct constituting the contempt, but used that conduct in determining the amount of sanctions to impose. The trial court, at Appendix A, page 10a, found that Petitioner had violated the order in limine. That violation was the subject of the second contempt proceeding, Appendices F and G; and Petitioner was acquitted in that proceeding. (Appendix G) The trial court's erroneous finding was repeated by the First Court of Appeals.

pages 4a - 6a; Appendix B, page 45a. Petitioner raised in his sixth point of error in the Court of Appeals the issue that the judgment was void since one punishment was imposed for multiple acts of conduct, some of which would not support the judgment (*see, e.g., Ex parte Jordan*, 787 S.W.2d 367 (Tex. 1990)). The Court of Appeals held that "a trial court's Rule 13 Sanction Order must be upheld if any of the facts set forth by the court supports the sanctions," citing *Monroe v. Grider*, 884 S.W.2d 811 (Tex. App. - Dallas 1994, writ denied) and *New York Underwriters Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 856 S.W.2d 194 (Tex. App. - Dallas 1993, no writ). Appendix B, at page 38a. The Court of Appeals thereby ignored this Honorable Court's decision in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 440 - 41 (1911), wherein this Court held that where a person has punishment imposed for multiple acts, the judgment must be reversed if the defendant has been sentenced on any count which did not constitute a disobedience.

The First Court of Appeals did not find that **all** of the findings of the trial court would support Rule 13 sanctions, rather it only addressed those findings that it opined would properly support the sanctions. Appendix B, pages 38a - 44a. This is a tacit admission by the Court of Appeals that Petitioner is correct when he argued that some of the trial court's findings would not support sanctions under Rule 13. However, instead of reversing the judgment, as *Gompers* requires, the First Court of Appeals joined with the Dallas Court of Appeals to hold that attorneys may be subjected to a denial of due process and equal protection in sanctions proceedings, when, if the proceedings were contempt proceedings under Texas law, the defective judgment would have been reversed.

Further, the authority of *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 440 - 41 (1911) and *Ex parte Jordan*, 787 S.W.2d 367 (Tex. 1990) required the First Court of Appeals and the Supreme Court of Texas to reverse and render the judgment as *Gompers* requires.

QUESTION 9: Was Petitioner impermissibly denied basic procedural due process protections, under the Fifth, Sixth and Fourteenth Amendments, including the right to trial by jury and proof beyond a reasonable doubt, before punitive fines of $100,000 were imposed against him?

Wrong Burden of Proof - Due Process Violation

Beginning at page 31a of Appendix B, the Court of Appeals flatly rejected Petitioner's point of error that the wrong burden of proof was employed, holding that the proceeding was a civil proceeding. Regardless of how characterized by the trial court and the Court of Appeals, the proceedings against Petitioner were, according to this Court's precedent, clearly in the nature of criminal contempt proceedings since he was tried (and punished) for past behavior and Petitioner had no opportunity to purge the fine. *Bagwell* Further, Petitioner was subjected to a (constitutionally) serious penalty – one that was originally $994,000. *Metzger v. Sebek*, 892 S.W.2d 20 (Tex. App. – Houston [1sts Dist.] 1994, writ denied, cert. denied). The fact that the sanctions were reduced from $994,000 to $100,000 following remand, does not change the nature of the proceedings or lessen the scrutiny to be given to the procedure used to assess them.

Whether or not the proceedings were contempt proceedings, Petitioner was nevertheless facing a "serious penalty"; the proceedings against Bradt were therefore quasi-criminal and the burden of proof should have been "beyond a reasonable doubt." *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994). Having been tried and held to the lower burden of proof, this Honorable Court should hold that Petitioner's Due Process rights were violated.

Right to Jury Trial

Petitioner was first sanctioned $994,000, which, following remand was reduced to $100,000 - a serious penalty under the United States Constitution. A jury fee was paid in the case but

the trial court denied Petitioner a jury trial. [4] In addressing Petitioner's second point of error, the First Court of Appeals affirmed that ruling, holding that even though Metzger had demanded a jury trial, Petitioner had not demanded a jury trial and was not a party to the proceedings. (Appendix B, page 34a).. This conflicts with the decisions of this Honorable Court in *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994); and *Muniz v. Hoffman*, 422 U.S. 454 (1978), and adversely impacts Petitioner's Sixth Amendment Rights *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 831 (1994); *see also Hicks v. Fejock*, 485 U.S. 624, 632 (1988) (in a contempt action, as in any other, "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings")

Burden of Proof

By his first point of error at the Court of Appeals, Petitioner raised the question of whether the wrong burden of proof was used against him. The First Court of Appeals held that Petitioner was not entitled to have the evidence used against him to meet the standard of proof beyond a reasonable doubt. Appendix B, pages 31a - 34a. Further, the First Court of Appeals did not even apply the lesser standard of "clear and convincing evidence" which is usually required in quasi-criminal proceedings in Texas. *See, e.g., Lawson-Avila Construction, Inc. v. Stoutamire*, 791 S.W.2d 584 (Tex. App. - San Antonio 1990, writ denied).

The Court of Appeals held that the proceedings against Petitioner were not a contempt, even though the Court of Appeals characterized the sanction as a "fine" ten different times. In *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418,

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[4] Interestingly, while the Court of Appeals found that Petitioner was not a party, Metzger, who was a party, was also denied a jury trial on his sanctions of $100,000. If Metzger was entitled to a jury, Petitioner was also.

444 (1911), this Honorable Court held that if a sentence is wholly punitive, "it could have been imposed only in a proceeding instituted and tried as a contempt" and that the defendant "must be proved guilty beyond a reasonable doubt." *Id.*

The judgment of the trial court and the decision of the Court of Appeals therefore conflicts with *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911) and *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 831 (1994). This Honorable Court should reverse the First Court of Appeals and hold that the proceedings for sanctions against Petitioner were contempt proceedings and that Petitioner was entitled to have his conduct proven beyond a reasonable doubt.

QUESTION 10: Was Petitioner subjected to multiple and/or successive punishments for the same conduct in violation of his Double Jeopardy protections under the Fifth and Fourteenth Amendments when Petitioner was (i) fined $500 for criminal contempt, (ii) then acquitted in a separate criminal contempt proceeding, and (iii) then fined $100,000 for the same conduct?

Double Jeopardy

During the trial in 1992, Petitioner was held in contempt and fined $500, which Petitioner paid. After the trial in 1992, the trial court issued a Show Cause Order (Appendix F) commanding Petitioner to appear and show cause why he should not be held in contempt for some of the same conduct that the trial court used in assessing the sanctions against Petitioner. This contempt was sought by the Respondents. After a full trial on the merits of the contempt, Petitioner was acquitted. Appendix G.

The trial court used the conduct that was the subject of contempt proceedings against Petitioner to determine the amount of sanctions to impose against Petitioner. Appendix A. The payment of the fine on the one contempt and Petitioner's acquittal on the second contempt forbids the use of that conduct

to form the basis for any sanctions in any other proceeding. *United States v. Benz*, 282 U.S. 304 (1930). Further, the use of the conduct on which Petitioner had been acquitted, denies Petitioner *double jeopardy, res judicata* and *collateral estoppel* rights as set forth in *Ashe v. Swinson*, 397 U.S. 436 (1970) and *United States v. Dixon*, 509 U.S. 688 (1993). When an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. *Ashe*, at p. 443. The Court of Appeals denied Petitioner's point of error which raised this constitutional violation. (Appendix B, page 36a)

CONCLUSION

If allowed to stand, the reported decision of the First Court of Appeals will harbinger the death of Due Process in Texas. For all of the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari and, upon full submission, reverse and render the decision of the First Court of Appeals and remand this cause to the Supreme Court of Texas for further proceedings not inconsistent with this Court's decision. Petitioner respectfully requests that this Honorable Court grant Petitioner general relief.

Respectfully submitted,

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FILED
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OFFICE OF THE CLERK

No._____

IN THE

Supreme Court of the United States

October Term 2000

L.T. BRANT,
Petitioner,
v.
EARLE LILLY, PIRE & LILLY, P.C., DEPELCHIN CHILDREN'S CENTER, BAYLOR COLLAGE of MEDICINE, EARNEST KENDRICK, MICHAEL D. COX, JEAN GUEZ, BARBARA TAYLOR, LUISA MARIA ACEVEDE LOHNER, ANN M. HODGES AND JOEL A. NASS,
Respondent.

APPENDICES TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

APPENDICES A-B-C-D-E

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APPENDIX A

Cause No. 90-53676

Mark Metzger	§ IN THE DISTRICT
	§ COURT OF
V.	§ HARRIS COUNTY,
	§ TEXAS
	§ 234th JUDICIAL
Judy Sebek, et al	§ DISTRICT

ORDER

Came on to be considered in the above-styled and numbered cause Defendants' Motions for Sanctions against Plaintiff Mark Metzger ("Metzger") and his attorney, L.T. Bradt ("Bradt"). Based on judicial notice taken of the pleadings, motions, and briefs in the court's file, the statement of facts of proceedings in the 269th District Court, the opinions of the numerous trial and appellate judges in this case and in related and resulting cases in federal and state courts, and the testimony and arguments presented at the sanctions hearing in this court, the Court makes the findings of fact and conclusions of law set forth below. Because of the number of mixed questions of law and fact involved in this case, findings of fact and conclusions of law are interspersed.

Procedural Background

This suit was originally filed by Plaintiff's former attorney, James A. Drexler, in U.S. District Court on July 13, 1989. After extensive proceedings in that court, on August 16, 1990, the Hon. Norman Black dismissed the case for want of jurisdiction, indicating that the federal claims based on 28 U.S.C. § 1983 and the RICO Act were without merit.

The Order indicated that

> While the finder of fact would certainly be interested in deposition testimony in which any Defendant admitted entering into a conspiracy with the other Defendants to violate Plaintiff's civil rights or admitted joining an enterprise to injury Plaintiff's property or business, it is not likely that such discovery will ever by available.

The case was refiled by Drexler in the 269th District Court on September 24, 1990, against the Plaintiff's former wife, her lawyer, her lawyer's firm, two hospitals, and six psychiatrists and psychologists. On July 12, 1991, Bradt filed the Plaintiff's Second Amended Petition, adding another attorney as a defendant. Over the next five months, Bradt filed three more amended petitions, concluding with the Fifth Amended Petition upon which the Plaintiff went to trial. Except for minor differences (some of which are noted in the footnotes), the petitions were largely a repetition of the proceeding ones.[1]

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[1] In addition to adding Joel Nass as defendant, the Second Amended Petition added a claim for exemplary damages for 10 times the amount of actual damages, and a claim for attorney's fees and a permanent injunction. The Third Amended Petition added claims for fraud and extortion, pled actual damages of $7.5 million, and expanded the RICO claims by adding the hospitals, Harris County Children's Protective Services, and the Texas Department of Human Services as "associated enterprise." The Fourth Amended Petition added claims for abuse of process, fraud, and raised alleged actual damages to $25 million.

Trial began on March 31, 1992. On May 7th, 1992, after more than 20 days in trial and testimony from 25 witnesses, the trial judge granted a directed verdict. A post-trial hearing was held on May 15th, 1992 regarding sanctions to be entered against Metzger and his attorneys., and by order dated May 21, 1992 they were sanctioned for almost $1 million in expenses and attorneys' fees incurred by the Defendants in the litigation.

On appeal, the First Court of Appeals affirmed the directed verdict, but reversed the order of sanctions. *Metzger v. Sebek*, 892 S.W.2d 20 (Tex.App.-Houston [1st Dist.] 1994, writ denied). As to Metzger, the appellate court found that by lying in an affidavit he had committed a "despicable, shameful act," and should be sanctioned under Rule 13. However, the appellate court held that the amount assessed against him was excessive, and remanded for consideration of the amount of sanctions that would "fit the crime" of filing the false affidavit. As to Bradt, the appellate court reversed and remanded for consideration of his recusal motion, and thereafter of the Defendants' request for sanction against him pursuant to Rule 13. Upon remand, the trial judge voluntarily recused himself, and the case was transferred to this court for proceedings pursuant to the appellate court's mandate.

The Allegations of Conduct of Bradt Meriting Sanctions

The Defendants' motions for sanctions assert that the Plaintiff's Fifth Amended Petition and the Plaintiff's various responses to each of the Defendants' motions for summary judgment were signed by Bradt in violation of Rule 13.[2] Taken

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[2] Although the Plaintiffs' Original Petition was also listed by Defendants prior to the sanctions hearing, they dropped any claim for sanctions based thereon as that petition was signed by neither Metzger nor Bradt and thus cannot form the

at face value, the petitions alleged a combination of literally thousands of individuals for the purpose of bringing hardship upon the Plaintiff. After winnowing the multifarious torts, statutory violations, and other forms in which these wrongs were asserted, the gravamen of Plaintiff's claims was that the Defendants intentionally manufactured evidence that the Plaintiff sexually abused his son for the purpose of (a) helping his ex-wife obtain an unfair advantage in their divorce proceedings, or (b) obtaining counselling fees for treating the child. The predicate elements for sanctions under Rule 13 are that the pleading filed was (1) groundless, and (2) brought in bad faith or for purposes of harassment.

Were the Allegations in the Pleading Groundless?

The evidence is overwhelming that the Plaintiff's causes of action were groundless. The appellate court affirmed the directed verdict on all of Plaintiff's claims "because (1) some were not viable to begin with, and (2) there was no evidence to support the ones that were viable." *Bradt v. West*, 892 S.W.2d 56,64 (Tex.App.-Houston [1st Dist.] 1994, writ denied). The appellate opinions stemming from the trial cover 62 pages and 117 headnotes in the Southwestern Reporter, 2d Series, most of which set forth in detail the numerous failings in Plaintiff's pleadings. However, by way of example, the claims asserted were groundless in the following respects:

> the conduct of Metzger's son was so startling and suggestive that, not only did the Defendants have a duty to report it, they faced criminal prosecution if they did not; Texas Family Code §§ 34.01, -.02(d), and -.07;

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basis for Rule 13 sanctions against them.

- mental health professionals such as the Defendants owe no duty to a parent such as Plaintiff with respect to misdiagnosis; *Bird v. W.C.W.*, 868 S.W.2d 767 (Tex. 1994);[3]

- having requested entry of an agreed judgment in his divorce proceeding, Plaintiff cannot later attack that judgment; *see Casu v. Marathon*, 896 S.W.2d 388 (Tex.App.--Houston [1st Dist.] 1995, writ denied);

- a court-appointed psychologist such as Defendant Guez is immune from prosecution; *Bird v. W.C.W.*, *supra*;

- the negligent infliction of emotional distress claim is not recognized in Texas; *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993);

- Metzger had no standing to assert a RICO claim, and did not make any argument for extension of the law; *Metzger v. Sebek*, 892 S.W.2d at 54, fn. 31;

- There is no cause of action against an opposing party's counsel (I.E. Defendants Lilly and Nass) arising from the discharge of

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[3] Although not issued until January 5, 1994, previous cases had reached the same result. *Vineyard v. Kraft*, 828 S.W.2d 248 (Tex.App.--Houston [14th Dist.] 1992, writ denied; *Dominguez v. Kelly*, 786 S.W.2d 749 (Tex.App.--El Paso 1990, writ denied).

counsel's duty to his own client; *Bradt v. West*, 892 S.W.2d at 71-72 [citing cases]; and

- Defendant Lilly did not infuse child abuse allegations into the family law proceeding in January of 1987; *Metzger v. Sebek*, 892 S.W.2d at 27.

Even in those few instances where Plaintiff was able to find something that was suggestive of error in the slightest degree in the Defendants' extensive records and treatment, the appellate court correctly noted that is impossible to conceive how such incidents support Plaintiff's grandiose allegations. *Metzger v. Sebek*, 892 S.W.2d at 44-45. Accordingly, the record before this court establishes that the Plaintiff's causes of action were groundless.

Were the Allegations Brought in Bad Faith or for Harassment

As with any effort to determine the intent of an accused, because of the improbability of an admission of guilt the Court must look to circumstantial evidence. Several actions occurring before, during, and after the trial bear on the bona fides of Bradt in asserting the claims set forth in the Plaintiff's pleadings. While some of the actions noted below are beyond the scope of punishment in this proceeding, they cannot be ignored because (1) they reflect on the motivation of counsel in taking the actions that are punishable herein, (2) they are separated into different proceedings only because Bradt chose to raise them repeatedly in different courts, (3) they reflect certain patterns and habits of Bradt that became more apparent when viewed in context, and (4) they reflect the evidence indisputably known to Bradt in signing the pleadings herein.

Subsequent Suits

Soon after the directed verdict, Bradt brought two new suits in his own name against literally everyone who dared to oppose him in the underlying trial. The first action was brought in federal court against the trial judge, the trial court reporter, the attorneys for the Defendants, Metzger's former wife, and the prosecutor who prosecuted the trial judge's contempt charge in federal court. The federal court dismissed the case, and sanctioned Bradt by ordering him to pay the attorney fees and costs incurred by the trial judge and the prosecutor. Bradt then personally filed suit in state court against the trial judge, all the Defendants, all their attorneys, all their insurers, and the contempt prosecutor. *See Bradt v. West, supra.* Summary judgment was granted against Bradt, and on appeal the appellate court not only affirmed but granted sanctions against Bradt for filing a frivolous appeal. *Id.* at 78-81. The appellate court noted that Bradt's actions showed bad faith by turning a blind eye to established law, by adding new causes of action which he knew were improper, by avoiding direct inquiries from the court about the groundlessness of his claims, and by filing an affidavit in response to the motion for summary judgment in that case that he knew or should have known was incompetent and groundless. *Id.* at 79-80.

The filing of these subsequent suits is not sanctionable in this proceeding. However, the filing of multifarious suits and claims and the findings of bad faith therein provide strong evidence that the motivation of Bradt in the underlying case was personal animus rather than zealous advocacy. An attorney acting in bad faith will file a flurry of vindictive and harassing satellite suits to try to punish his opponents. The pattern of Bradt's activities indicates a purpose of bad faith and harassment almost unparalleled in Texas jurisprudence.

Lack of Discovery

Rule 13 provides that when an attorney signs a pleading, such is a certification that "to the best of their knowledge, information, and belief *formed after reasonable inquiry* "to the best of their knowledge, information, and belief *formed after reasonable inquiry* the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment." In this case, although Plaintiff sued 12 different Defendants, no deposition was taken of any of them before trial. Any deposition, indeed even the most cursory informal inquiry, would have disclosed that:

- not only did the Defendants not have regular meetings and communications in furtherance of their conspiracy (Fifth amended Petition, ¶ 4.2[G], many of them had never even met each other (see, e.g., Vol. X, pp. 2296-97 and pp. 2343-44; Vol XII, p. 2963);

- in medical nomenclature (or in general English usage, for that matter) the term "rule out" does not mean that certain possible diagnoses have been discarded, but represent possible diagnoses under consideration (Vol IX, pp. 2050-51) *see Metzger v. Sebek*, 892 S.W.2d at 44; and

- not only did the Defendant Cox not implicate the Plaintiff in his testimony before the grand jury (Amended Petition, ¶ 4.2[E]), he testified to the contrary that his evaluation of the Plaintiff was inconsistent with a sex abuser.

The record establishes that the pleadings signed by Bradt were not made after reasonable inquiry, and thus violated Rule 13.

Knowing Misrepresentations at Trial and at the Sanctions Hearing

As noted by the appellate court, "Metzger's attorneys misread documents and attempted to mislead the judge and some witnesses." *Metzger v. Sebek*, 892 S.W.2d at 39. The record and the appellate opinion indicate that this was not a matter of isolated lapses but a consistent pattern of conduct. Without repeating the many instances cited in the appellate opinions, a few brief examples are:

- Bradt suggested that Defendant Taylor had cast aspersions that the Plaintiff had done something wrong, when she actually had only reported that the family was under stress due to a criminal proceeding against the Plaintiff (Vol. III, pp. 655-58);

- Bradt quoted a record as finding "a chronic history of abandonment" when it actually reported only "a chronic history of abuse" (Vol. II, pp. 329-30); and

- Bradt and Metzger throughout the trial and again at the sanctions hearing stated without qualification that Dr. Cox gave sworn testimony that Metzger sexually abused his son, a charge they both finally retracted (after considerable evasion) when this court demanded proof.

Black's Law Dictionary defines "bad faith" in part as "a design to mislead or deceive another." Black's Law Dictionary 127 (5th Edition 1979). Accordingly, an attorney or party who seeks to mislead a court and jury clearly is acting in bad faith. As noted above, while these actions may not themselves be punishable under Rules 13, they nevertheless show an intent to

win regardless of the truth. The existence of bad faith during and after the trial present circumstantial evidence of the same prior to the trial.

Disregard for the Rules of Practice & Procedure

As noted by the appellate court, "Metzger's attorneys repeatedly violated the order in limine; violated other orders of the court' interrupted the judge; grumbled audibly about the rulings; laughed at the judge..." *Metzger v. Sebek*, 892 S.W.2d at 39. Again, the record and the appellate opinion indicate that this was not a matter of isolated lapses but a consistent pattern of conduct during the trial. By way of brief examples, attorney Bradt:

- violated the trial judge's order in limine by introducing and repeating the highly prejudicial item of a polygraph test (Vol. III, p. 690); and

- violated the trial judge's order in limine by introducing and repeating allegations of infidelity by the Plaintiff's former wife (Vol. III, p. 776).

The trial judge repeatedly admonished Bradt, usually to no avail. The record reflects that the trial judge carefully considered whether Bradt's actions might have been the result of mistake or mental lapses as opposed to intentional acts. However, the record of the trial and the sanctions hearing, as well as the repeated warnings and the continued violations, overwhelmingly supports the trial judge's conclusion that such actions were intentional.

Again, these actions are not themselves punishable under Rules 13, but they indicate an intent to win regardless of the rules. The rules were established "to obtain a just, fair, equitable and impartial adjudication of the rights of litigants." TEX. R.

CIV.P. 1. An attorney or party who intentionally and repeatedly violates such rules must be seeking something other than such goals, and is acting in bad faith.

The Nature of the Conspiracy and Claims Alleged

As advocates for the interests of another, trial counsel must believe in the facts are related by the client and be given wide latitude in asserting such claims even against strong contradictory evidence. However, this is not a license for the professional to choose to be blind to the obvious. At some point, a client's allegations become so patently false that counsel must refuse to advocate them. *See* Texas Disciplinary Rules 3.01, 3.03(a)(5), 3.03(b), and 3.04(b). Under the provisions of Rule 13, if counsel makes reasonable inquiry and determines that a pleading is groundless and cannot be asserted in good faith, the pleading must not be filed.

In this case, the conspiracy alleged among thousands of independent actors is patently incredible. The notion that thousands of very busy people would join a plot to bring trouble upon a single individual previously unknown to them does not comport with reality. When faced with allegations so contrary to common sense, counsel must exercise care to ensure that the case had merit. An attorney cannot bring suit alleging a conspiracy with Martians and avoid rule 13 sanctions by asserting the duty to believe one's client.

Further, the critical harm suffered by the Plaintiff in this case is obviously the indictment for sexual abuse. The entire transcript of the grand jury proceedings were available to Bradt. Such transcript indicates unequivocally that none of the Defendants accused the Plaintiff of abuse or sought his indictment.

Additionally, in the context of divorce and child custody proceedings, counsel must recognize that the potential and motivation for harassment is very high. Such proceedings inherently involve damage to the most intimate and cherished personal relationships, with some of the most disruptive and traumatic personal consequences that the participants may ever face. It is natural that the individuals involved may desire revenge. The professionals who handle such proceedings must ensure that they are not being used as a weapon for such revenge.

Throughout the trial, and especially in his own testimony, it is obvious that the Plaintiff felt cheated by the outcome of the divorce. Naturally, he was also furious about the allegations of and indictment for sexual abuse. Further, he completely discounted the extremely well-documented and bizarre behavior of his 3 year old son as innocent and normal. Faced with these facts, Bradt must have known that his client's motivation was to exact revenge against his former wife and those who attempted to help the family.

The concept of "harassment" in Rule 13 must mean more than vexing or difficult, as all litigation is likely to be so. Instead, the vexation must be related to some improper use of the litigation for purposes collateral to the suit stated. At the sanctions hearing in this court, Bradt admitted knowing that his client's purpose in bringing this case was to try to change the result of the divorce proceeding. This may be a proper purpose for further proceedings in the family court, but it an improper purpose for proceedings against all the health care providers in collateral litigation.

This is not to ignore the extreme agony suffered by the Plaintiff if in fact he was falsely accused. Nor should it be ignored that governmental and quasi-governmental officials may cause tremendous harm if they trample upon fragile family

relationships without cause. However, one who is treated improperly or even rudely by a government official, and who then sues them despite knowledge that an action at law cannot be brought thereon, is acting in bad faith and for the purpose of harassment.

The Number of Defendants

The number of defendants sued in this case is not alone evidence of bad faith. Indeed, it appears to be quite common to sue all potential parties and then find out the facts later and nonsuit those without liability. Without opining on whether such practice itself meets the requirements of Rule 13, Bradt did not much more than that in this case. Having sued virtually everyone even tangentially involved in trying to treat his son, Bradt made little investigation as to whether any of the Defendants actually did any of the acts alleged, ignored the evidence before him that they did not, never nonsuited anyone, vigorously tried to keep all the Defendants in the suit (including the use of the perjurious Metzger affidavit), and then protracted the trial for over one month. Such appear more consistent with the acts of an attorney who cannot be troubled with the facts rather than one attempting to determine the truth.

The Length of Trial

Similarly, while a long trial is not alone evidence of harassment, an individual intending to harass would obviously prefer long, drawn-out proceedings to make them as painful as possible. Although the Plaintiff's case lasted for more than a month, it is clear that if Bradt and his co-counsel had not been restrained by the trial judge, it would have lasted far longer than that. The trial judge attempted to place some restraints on the case by instituting time limits and eliminating certain claims and irrelevant witnesses long before the Plaintiff rested, as to all of which Plaintiff's counsel objected and sometimes paid no heed.

In this case, the testimony presented by Plaintiff most often resembled a fishing expedition rather than a trial. Pages and pages of the statement of facts are devoted to asking witnesses to identify the pages on which their handwriting appears, the custody of various documents, and the source of information written down 5 or 6 years before. Taken together, the length of the trial and the irrelevancy of most of it constitute circumstantial evidence that Bradt's purpose in filing suit was harassment.

Appropriate Sanctions Against Metzger

As discussed above, it is clear from the trial transcript that Plaintiff's claims were groundless. The most fitting sanction for bringing a frivolous action is to see that the attorneys' fees incurred as a result are reimbursed. The evidence presented in this court indicates that the Defendants passed their motions for summary judgment because they felt they would be denied based on Metzger's affidavit. Accordingly, all fees and expenses incurred by the Defendants thereafter arguably could have been avoided but for the affidavit. Such fees and expenses preparing for and trying this case approximated $1 million. However, the Court of Appeals found such sanction to be too severe, and accordingly only a lesser amount can be considered.

Because of the breadth of his allegations, the trial made necessary by the false affidavit was necessarily an extended one. However, absent the false affidavit, the summary judgments likely would not have disposed of the case in its entirety. Further, the "antics"[4] of Metzger's attorneys (for which he does not appear to be answerable) played a part in the extreme and unnecessary length of the trial. At the very least, however,

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[4] The term employed by the appellate court. *Metzger v. Sebek*, 892 S.W.2d at 29

Metzger's affidavit necessitated 10% of the fees and expenses, and accordingly a sanction of $100,000.00 seems just and appropriate.

Assessment of this small part of the horrendous expenses attending this litigation would be just according to Metzger's own standards. Metzger sought $25 million in actual damages and $250 million in punitive damages for what he alleged were the lies by the Defendants. It does not seem unfair to require him to pay 1/2750 of that amount for the proven lies he made in return.

Appropriate Sanctions Against Bradt

Assessing sanctions against an attorney is not an action to be undertaken lightly. In a system in which litigants must largely depend upon legal professions to gain access to the courts, the potential chilling effect of holding counsel responsible for the substance of the charges made must be carefully weighed. Nevertheless, both the Texas Legislature and the Texas Supreme Court have repeatedly made provision for sanctions against frivolous pleadings and directed that they be assessed against the attorney involved where appropriate.

This case is distinguishable and extraordinary because attorney Bradt was informed of the obvious legal impediments to Plaintiff's claims, knew of the unquestionable evidence contrary to those claims, took a shotgun approach to joining sanctions previously assessed against Bradt in smaller amounts have had no effect to date on his behavior. No judicial warnings, rebukes, or minor sanctions to date have slowed his personal efforts to see that this litigation is protracted, convoluted, and wasteful. Further, the Court is convinced that Bradt's personal animus is as much to blame for the excesses of

this litigations as his client, and he should not be sanctioned any less. Accordingly a sanction of $100,000.00 seems just and appropriate.

Conclusion

It is therefore ORDERED that Defendants have and recover from L.T. Bradt attorney's fees and related expenses in the sum of One Hundred Thousand Dollars ($100,000.00).

Further, it is ORDERED that Defendants have and recover from Mark Metzger attorney's fees and related expenses in the sum of One Hundred Thousand Dollars ($100,000.00)

SIGNED this day, April 8, 1996.

/s/ Scott Brister
Hon. Scott Brister
Judge, 234th District

APPENDIX B

COURT OF APPEALS
FIRST DISTRICT OF TEXAS
JUDGMENT

L.T. BRADT, APPELLANT

NO. 01-96-00943-CV V.

JUDY SEBEK, EARLE LILLY, PIRO & LILLY, P.C., DEPELCHIN CHILDREN'S CENTER, BAYLOR COLLEGE OF MEDICINE, ERNEST KENDRICK, MICHAEL D. COX, JEAN GUEZ, BARBARA TAYLOR, LUISA MARIA ACEVEDO LOHNER, ANN M. HODGES and JOEL A. NASS, APPELLEES

Appeal from the 234th District Court of Harris County, Texas. (Tr.Ct.No. 90-53676). Panel consists of Justices Cohen, Nuchia, and Duggan. Opinion delivered by Justice Duggan.

The cause heard today by the Court is an appeal from the judgment signed by the court below on April 8, 1996. After submitting the cause and inspecting the record of the court below, the Court rules as follows: (1) in accordance with the joint motion of appellant L. T. Bradt and appellee Judy Sebek and this court's order of June 3, 1999, the judgment of the court below in favor of appellee Sebek is reversed and a take-nothing judgment is rendered as to her; (2) with respect to the remaining

appellees, there was no reversible error in the judgment. It is, therefore, **CONSIDERED, ADJUDGED,** and **ORDERED** that the judgment of the court below-in favor of appellee Sebek be **reversed** and a take-nothing judgment **rendered** as to her; as to the other appellees the judgment of the court below is in all things **affirmed**.

It is further **ORDERED** that the appellant, L.T. Bradt, pay all costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Cohen, Nuchia, and Duggan.

Judgment rendered January 13, 2000.

Court of Appeals of Texas,
Houston (1st Dist.).

L.T. BRADT, Appellant,
v.
Judy SEBEK, Earle Lilly, Piro & Lilly, P.C., Depelchin Children's Center Baylor College of Medicine, Ernest Kendrick, Michael D. Cox, Jean Guez, Barbara Taylor, Luisa Maria Acevedo Lohner, Ann M. Hodges and Joel A. Nass, Appellees.

No. 01-96-00943-CV.

Jan. 13, 2000.
Rehearing Overruled April 7, 2000.

Following dismissal of his federal claims in federal district court, former husband brought suit in state court against his former wife, her attorney, and others, alleging various causes of action. The 269th District Court, Harris County, David West, J., directed verdict against husband on all causes of action and assessed sanctions against him and each of his trial attorneys for $994,000. Husband and his attorneys appealed. Following affirmance of the directed verdict and remand of only the sanctions award, 892 S.W.2d 20, and after the trial judge's voluntary recusal, the District Court, Scott Brister, J., ordered husband and one of his attorneys to each pay $100,000 in sanctions to defendants. Attorney appealed. The Court of Appeals, Lee Duggan, Jr., J. (Retired), held that: (1) $100,000 sanction against attorney was a civil sanction, requiring review for abuse of discretion; (2) fact that attorney was twice held in contempt for his conduct during the underlying trial did not preclude imposition of sanctions for his pre-trial conduct; (3) all of husband's causes of action were groundless; (4) that attorney personally sued opposing parties, their counsel, and court

personnel following directed verdict against his client in the underlying suit was sufficient evidence of attorney's bad faith and intent to harass, prior trial of that underlying suit, to warrant sanctions; and (5) attorney was responsible for each groundless pleading, and thus, imposition of $100,000 in sanctions was warranted, and even disproportionately small.

Affirmed.

West Headnotes

[1] Appeal and Error 984(1)

The Court of Appeals reviews a trial court's sanctions order for filing a groundless pleading in bad faith or for purposes of harassment under an abuse of discretion standard. Vernon's Ann. Texas Rules Civ. Proc., Rule 13.

[2] Appeal and Error 946

The test for abuse of discretion is deferential to the trial court; whether the court acted without reference to any guiding rules and principles; therefore, it is not necessarily an abuse of a trial court's discretion if under the same facts the Court of Appeals would decide the matter differently, or if the trial court committed a mere error in judgment.

[3] Costs 2

The trial court's discretion to impose sanctions is limited only by the requirement that its order be just and that the sanction imposed be directly related to the harm done by the sanctioned conduct.

[4] Courts 85(2)

Courts apply the same rules of construction to rules of procedure as to statutes.

[5] Courts 85(2)

When a rule of procedure is clear, unambiguous, and specific, courts construe its language according to its literal meaning.

[6] Courts 85(2)

Rule interpretation is a pure question of law over which the judge has no discretion.

[7] Costs 2

A sanction hearing on whether to impose sanctions for filing a groundless pleading in bad faith or for purposes of harassment need not involve a finding of contempt. Vernon's Ann. Texas Rules Civ. Proc., Rule 13.

[8] Contempt 2

A party who files a groundless pleading in bad faith or for the purpose of harassment is subject to a range of punishments, one of which is a finding of contempt. Vernon's Ann. Texas Rules Civ.Proc., Rules 13, 215.2 subd.b.

[9] Appeal and Error 984(1)

Finding that attorney filed groundless pleadings in bad faith was a civil matter, and thus, $100,000 sanction against attorney was a civil sanction, requiring review for abuse of discretion. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

[10] Attorney and Client 24

By making no findings that attorney filed a fictitious suit or fictitious pleadings as an experiment to get an opinion of the court or that he knowingly made false statements in pleadings for the purpose of securing a delay of the trial of the cause, the trial court at sanction hearing was not required to hold attorney in contempt before imposing sanctions. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

[11] Jury 28(6)

By never requesting a jury for the sanctions proceeding and failing to object to court's role as fact-finder at sanctions hearing, attorney who was assessed $100,000 in sanctions for filing groundless pleadings in bad faith waived right to jury, even though jury demand was made in the underlying trial, where he was not a party in underlying trial. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

[12] Constitutional Law 303

Attorney's sanctions hearing was a civil proceeding, and thus, notice of the date of the sanctions hearing and notice that procedural rule governing the filing of groundless pleadings was the basis for potential sanctions provided him with adequate notice consistent with due process. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

[13] Double Jeopardy 139.1

[13] Double Jeopardy 152

Attorney was not punished twice for the same offense in violation of constitutional proscription against double jeopardy when attorney was sanctioned for pre-trial conduct of filing groundless pleadings in bad faith after being twice held in contempt for his conduct during the underlying trial; sanctions proceeding dealt with actions attorney took before trial, and trial judge specifically noted in sanction order that attorney's actions during and after trial were not sanctionable, but merely indicative of attorney's bad faith intent prior to trial in filing groundless pleadings. U.S.C.A. Const.Amend. 5; Vernon's Am.Texas Rules Civ.Proc. Rule 13.

[14] Constitutional Law 251

Federal and state constitutional due process provisions are identical. U.S.C.A Const.Amend. 5; Vernon's Ann.Texas Const. Art. 1, § 13.

[15] Double Jeopardy 1.

[15] Double Jeopardy 132.1

The double jeopardy clause of the Fifth Amendment prohibits: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.

[16] Double Jeopardy 27

The double jeopardy does not bar the use of evidence from one offense to establish intent in a separate offense. U.S.C.A. Const.Amend. 5.

[17] Appeal and Error 1024.1

A sanction order, imposing sanctions for filing a groundless pleading in bad faith or for the purpose of harassment, must be upheld if any of the facts set forth by the court supports the sanctions. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

[18] Costs 2

"Groundless," as term is used to impose sanctions for groundless pleadings, is defined as (1) no basis in law or fact, and (2) not warranted by good faith argument for the extension, modification, or reversal of existing law. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

[19] Attorney and Client 24

Argument that mental health professionals owe a duty to the parent not to negligently misdiagnose a child patient's condition was not a good faith argument for extension or change of existing law, as required to avoid sanctions against attorney for filing a groundless pleading; even assuming claim of negligent misdiagnosis had a good faith legal basis, the facts precluded actionable negligence, considering that child's disturbing behavior provided ample evidence to professionals that client's son had been sexually molested and that client was implicated. Vernon's Am. Texas Rules Civ.Proc., Rule 13.

[20] Attorney and Client 24

Action for negligent infliction of emotional distress was groundless, as required to impose sanctions on attorney for filing action on behalf of his client, even is attorney could not have known at time of pleadings that state Supreme Court would reverse a court of appeals' opinion recognizing such a

claim, where attorney failed to introduce any evidence of outrageous conduct. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

[21] Damages 49.10

[21] Damages 50.01

Outrageous conduct is a necessary element of claims for both negligent and intentional infliction of emotional distress.

[22] Attorney and Client 24

Cause of action against client's wife's attorney for representing her in divorce action against client was groundless, are required to impose sanctions on attorney for filing action on behalf of his client, where there were many cases predating the pleadings that stood for proposition that there existed no cause of action against an opposing attorney for representing a client in a judicial proceeding. Vernon's Ann. Texas Rules Civ.Proc., Rule 13.

[23] Conspiracy 2

[23] Conspiracy 19

An agreement in a conspiracy may be tacit and informal, and a civil conspiracy can by established by circumstantial evidence.

[24] Attorney and Client 24

Cause of action for civil conspiracy against client's wife, her counsel in divorce action, and several agencies was groundless, as required to impose sanctions on attorney for filing action on behalf of his client, even assuming there was evidence of his client, even assuming there was evidence of a tacit agreement

between the defendants, where no actionable underlying tort action was pleaded. Vernon's Ann. Texas Rules Civ.Proc., Rule 13.

[25] Conspiracy 1.1

Conspiracy is not an independent, actionable claim.

[26] Attorney and Client 24

Attorney's unsupported assertions that he could have proven that his client had standing to pursue an action under Racketeer Influenced Corrupt Organizations Act (RICO) if he had not been prevented from exploring certain unidentified evidence at trial did not amount to a good faith argument that client was injured in his business or property by any predicate act of racketeering activity, and thus, RICO action against client's former wife, her counsel in divorce action, and several agencies was groundless, as required to impose sanctions on attorney for filing action. Vernon's Ann. Texas Rules Civ. Proc., Rule 13; 18 U.S.C.A. § 1961 et seq.

[27] Appeal and Error 837(11)

In considering whether a claim is groundless within the meaning of rule permitting sanctions for filing a groundless pleading in bad faith or for the purpose of harassment, the Court of Appeals will examine inadmissible evidence.

[28] Attorney and Client 24

That attorney personally sued opposing parties, their counsel, and court personnel following directed verdict against his client in an underlying suit was sufficient evidence of attorney's bad faith and intent to harass, prior trial of that underlying suit, to warrant sanctions against attorney for filing groundless

pleadings on behalf of client against same defendants, considering that attorney failed to make any reasonable inquiry to determine whether defendants did the acts alleged before signing pleadings. Vernon's Ann. Texas Rules Civ.Proc., Rule 13.

[29] Attorney and Client 24

Attorney was responsible for each groundless pleading, brought in bad faith or to harass the defendants, filed on behalf of client, and thus, imposition of $100,00 in sanctions was warranted, and even disproportionately small, where defendants' fees and expenses after client signed a false affidavit opposing defendants' motion for summary judgment totaled nearly $1 million.

[30] Costs 2

A party may be subject to a smaller subsection of sanctionable conduct for filing a groundless pleading in bad faith or for the purpose of harassment than his attorney; the party must be implicated for his unique conduct separate from the attorney's representation, while the attorney may be generally liable for each groundless pleading. Vernon's Ann. Texas Rules Civ.Proc., Rule 13.

[31] Costs 2

A sanction order must state with particularity good cause for finding that pleadings were groundless and not brought in good faith or groundless and brought for purposes of harassment, or else there is abuse of discretion. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

[32] Appeal and Error 1071.6

A trial court's failure to make particular findings in a sanction order for filing a groundless pleading in bad faith or for purposes of harassment may constitute harmless error when the trial court's findings of fact and conclusions of law supply the particulars of good cause required by under the rule governing such sanctions. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

*759 Paul E. Nunu, Houston, for Appellant.

John B. Wallace, Joy M. Soloway, Nancy J. Locke, J. Preston Wrotenbery, Kevin D. Jewell, Earle S. Lilly, Donald M. Hudgins *760 Alfred C. Koenig, Joel A. Nass, Jim Barker, Houston, for Appellees.

Panel consists of Justices COHEN, NUCHIA, and DUGGAN. [FN*]

FN* The Honorable Lee Duggan, Jr., retired justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

OPINION

LEE DUGGAN, Jr., Justice (Retired).

Appellant, L.T. "Butch" Bradt, appeals a Rule 13 sanction order and its levy of a $100,000 fine, asserting six point of error. We affirm.

Background

This appeal is the culmination of litigation originally filed in federal district court in 1989 by Mark Metzger against his former wife, her attorney, and various agencies and individuals (collectively, the "defendants"). The suit asserted various

theories of state liability, as well as federal claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C.A. § 1961-1968 (1984 & Supp. 1999)) and a civil rights statute. The federal district court dismissed Metzger's federal claims and abstained from exercising jurisdiction over his pendent state law claims. Metzger refiled his claims in state court. [FN] In 1992, following a month of trial and a directed verdict in favor of the defendants, the trial court assessed sanctions of $994,000 plus interest against Metzger and each of his attorneys. See Metzger v. Sebek, 892 S.W.2d 20, 50 (Tex. App.--Houston [1st Dist.] 1994, writ denied). Appellant was one of Metzger's attorneys.

FNI. As of the time of trial, Metzger's claims were for:

(1) civil conspiracy;
(2) civil conspiracy to extort from and defraud him of property and liberty interests protected by the Texas and United States Constitutions;
(3) malicious prosecution;
(4) "deprivation of civil rights based upon malicious prosecution",
(5) intentional infliction of emotional distress;
(6) medical negligence (asserted only against appellees Depelchin Children's Center, Baylor College of Medicine, Ernest Kendrick, Luisa Maria Acevedo Lohner, Michael D. Cox, and Barbara Taylor);
(7) negligent infliction of emotional distress (asserted only against Depelchine, Baylor, Kendrick, Lohner, Cox, and Taylor); and
(8) civil RICO
Bradt v. West, 892 S.W.2d 56, 61,62 (Tex.App.—Houston [1st Dist.] 1994, writ denied).

On appeal, this Court affirmed the directed verdict and concluded that the defendants had proved their right to sanctions against Metzger, but that the trial court had awarded an excessive amount of sanctions. Id. at 48, 53. We also reversed and remanded the award of sanctions against appellant because his motion to recuse the trial judge, the Honorable David West, had been filed timely. Id. at 49-50. On remand, after Judge West voluntarily recused himself, the Honorable Scott Brister held a hearing, in accordance with our instructions, to determine (1) the amount of sanctions to be awarded against Metzger, (2) whether appellant violated Texas Rule of Civil Procedure 13, and if so, (3) the appropriate amount of sanctions to be assessed against him. Following the hearing, Judge Brister issued an April 8, 1996 written sanction order ("Sanction Order"), determining that appellant had violated Rule 13 and ordering appellant and Metzger each to pay $100,00 to the defendants (appellees in this appeal). Metzger did not appeal the Sanctions Order.

In appealing from the Sanctions Order, appellant raises six points of error.

II.
Standard of Review

[1][2][3] This Court reviews a trial court's Rule 13 sanction order under an discretion standard, Laub v. Pesikoff, 979 S.W.2d 686, 693 (Tex.App.--Houston [1st Dist.] 1998, pet. denied). Our test for abuse of discretion is deferential to the trial court--whether the court acted without reference to any guiding rules and principles. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985). Therefore, "[i]t is not necessarily an abuse of a trial court's discretion if under the same facts we would decide the matter differently, or if the court committed a mere error in judgment." Tarrant County v. Chancey, 942 S.W.2d 151, 154 (Tex. App.—Fort Worth 1997,

no writ). Moreover, the trial court's discretion is limited only by the requirement that its order be just and that the sanction imposed be directly related to the harm done by the sanctioned conduct. Ray v. Beene, 721 S.W.2d 876, 879 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

III.
Discussion

A. Point No. 1: Whether the trial court used the wrong burden of proof in determining whether to impose a punitive fine against appellant.

Appellant argues in his first point of error that Judge Brister abused his discretion when he failed to apply a "beyond a reasonable doubt" standard in his Rule 13 hearing. He argues that, although Judge Brister specifically declined to hold him liable for criminal contempt, the proceedings against him "were in the nature of criminal contempt proceedings since he was being tried (and punished) for past behavior."

Texas Rule of Civil Procedure 13 provides:

> The signature of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule,

> the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215.2(b), upon the person who signed it, a represented party, or both.
> Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

TEX. R.CIV.P. 13 (emphasis added). According to appellant, the underscored language of the first paragraph's second sentence, "shall be held guilty of a contempt," indicated that Rule 13 proceedings are always quasi-criminal contempt proceedings imposing criminal punishment for past behavior and, therefore, requiring criminal law constitutional standards and protections. He further points out that Rule 215-2b also authorizes contempt, among other sanctions. See TEX. R. CIV. P. 215.2(b).

Appellees respond that appellant's $100,000 fine was compensatory in nature and not a criminal punishment for past behavior, that Judge Brister specifically limited the sanction hearing to potential civil sanction against appellant, and that he declined to conduct a contempt proceeding.

[4][5][6] Well settled principles guide the interpretation of Rule 13. Texas courts apply the same rules of construction to rules of procedure as to statutes. In re VanDeWater, 966 S.W.2d 730, 732 (Tex.App.—San Antonio 1998, no. pet.); Burrhus v. M & S Supply, Inc. 933 S.W.2d 635, 640 (Tex.

Ann.— San Antonio 1996, writ denied). When a rule of procedure is clear, unambiguous, and specific, we construe its language according to its literal meaning. Murphy v. Friendswood Dev. Co., 965 S.W.2d 708, 709 (Tex. App. — Houston [1st Dist.] 1998, no pet.) (interpreting Rule 13). We avoid constructions giving rise to constitutional infirmities. TEX GOV'T CODE ANN. 311.021(1) (Vernon 1997). Finally, we note that rule interpretation is "a pure question of law over which the judge has no discretion. " Mitchell Energy Corp. v. Ashworth, 943 S.W.2d 436, 437 (Tex. 1997).

[7] Applying these standards, it is clear that a Rule 13 sanction hearing need not involve a finding of contempt. The rule's first sentence generally addresses responsibility for instruments that are groundless and brought either in bad faith or for the purpose of harassment. Rule 13's second sentence addresses particularly egregious actions involving written pleadings, actions that rulemakers have determined must be dealt with as contemptuous conduct--(1) filing fictitious suits or pleadings to experiment or obtain court opinions or (2) making knowingly groundless and false pleadings in order to secure trial delays.

Rule 13's third sentence provides for "an appropriate sanction" under Rule 215.2(b). Because contempt has already been mandated for all instances of conduct described in the second sentence, the sanctions "available under Rule 215.1b)" apply to the remaining proscribed conduct, namely, that set out in Rule 13's first sentence.

[8] Reading sentences one and three together, a party who files a groundless pleading in bad faith or for the purpose of harassment is subject to a range of punishments under 215.2(b), one of which is a finding of contempt. Thus, the trial court can choose among a range of sanctions.

[9][10] Here, Judge Brister explicitly declines to consider a contempt sanction, as he might have done under Rule 215.2(b). Neither did he find, under the proscribed conduct of Rule 13's second sentence, that Metzger or appellant filed a fictitious suit or fictitious pleadings "as a experiment to get an opinion of the court" or knowingly made false statement in pleadings "for the purpose of securing a delay of the trial of the cause." Instead, Judge Brister found more generally under Rule 13's first sentence that Metzger and appellant filed groundless pleadings in bad faith, and chose from the discretionary range of punishments available under 215.2(b) (excluding a possible contempt sanction, which he refused to consider). Because Judge Brister did not make the findings envisioned in Rule 13's second sentence, he was not required to hold appellant in contempt. Rather than decide now whether a finding of contempt under Rule 13 would require a criminal standard of review and implicate the constitutional or procedural rights applicable to criminal proceedings, we simple hold that Judge Brister's general finding that appellant filed a groundless pleading in violation of Rule 13 is, under this record, a civil matter.

The standard of review of a trial court's imposition of a civil sanction under Rule 13 is clear—we review the trial court's decision for abuse of discretion. See Laub, 979 S.W.2d at 693. Therefore, our inquiry will turn on whether the Sanction Order is arbitrary or unreasonable.

Appellant's first point of error is overruled.

B. Point No. 2: Whether appellant was entitled to a jury trial on the assessment of punitive fines.

[11] Appellant argues in his second point of error that he was entitled to a jury trial on the assessment of punitive fines.

[11] Appellant argues in his second point of error that he was entitled to a jury trial on the assessment of his Rule 13 sanction because his $100,000 fine is a "serious offense" implicating a constitutional Sixth Amendment right to a jury trial. The record reflects, however, that appellant never requested a jury for the sanctions proceeding. Appellant concedes that he did not request a jury trial on the issue of Rule 13 sanctions, but argues that he was entitled to rely on the initial jury demand in the underlying trial. But appellant was not a party in the underlying trial, and, in any event, he failed to object to the trial court's role as fact finder at his sanctions hearing. Therefore, appellant's second point of error is waived. See generally Rodriguez v. Texas Dept. of Mental Health and Mental Retardation, 942 S.W.2d 53, 56 (Tex.App.—Corpus Christi 1997, no writ) (holding that a party waive his right to a jury trial by failing to object when the trial court undertakes to try the case before the bench). [FN2]

> FN2. Further, this Court has already determined that "[t]here is no right to a trial by jury on the issue of whether rule 13 has been violated." Neely v. Commission for Lawyer Discipline, 976 S.W.2d 824, 827 (Tex. App.— Houston [1st Dist.] 1998, no pet.); see also Brantley v. Etter, 677 S.W.2d 503, 504 (Tex. 1984) (per curiam) (rejecting the proposition that "one complaining of the award of attorney's fees as sanctions has the right to a jury trial to determine the amount of such attorney's fees" and holding that "the amount of attorney's fees awarded as sanctions for discovery abuse is solely within the sound discretion of the trial judge, only to be set aside upon a showing of clear abuse of that discretion").

Appellant's second point of error is overruled.

C. Point No. 3: Whether appellant was denied due process when the court declined to hear his special exceptions.

[12] Appellant next argues that he was denied due process of law because the defendants'/appellees' motions for sanctions were not sufficiently specific and Judge Brister refused to consider his "Special Exceptions and Motion for Specifics of Complaint. He argues that he was entitled to "full and complete notice of the subject matter and ...when, how, and by what means [he] has been guilty of the alleged defect," citing Ex parte Edgerly, 441 S.W.2d 514, 516 (Tex. 1969). Appellant also asserts that he was entitled to reasonable notice of each alleged contemptuous act, citing Ex parte Brister, 801 S.W.2d 833 (Tex. 1990). These and other cases appellant cites, however, arise in the context of criminal contempt proceedings.

Because appellant's Rule 13 hearing was a civil proceeding, his non-Rule 13 contempt cases are inapposite. He cites no cases holding that adequate notice for a Rule 13 hearing requires anything more than (1) notice of the date of the hearing and (2) notice that Rule 13 is the basis for potential sanctions. Texas case law tracks Federal Rule of Civil Procedure 11, and notice under that rule is satisfied when a party is put on notice that the opposing party will seek, and the trial court may impose, Rule 11 sanctions. See Monroe v. Grider, 884 S.W.2d 811, 817 (Texas App.—Dallas 1994. writ denied) (Texas courts "look to cases interpreting Federal rule 11 to interpret rule 13"); Merriman v. Security Ins. Co. of Hartford, 100 F.3d 1187, 1191 (5th Cir. 1996) (finding that the other party's series of letters, ultimata, and motions put [appellant] on notice that [the other party] would seek, and the district court might impose, Rule 11 sanctions").

We find that appellant was adequately apprised of the date of his Rule 13 sanctions hearing and that he would be potentially liable under Rule 13 for any pleadings that were groundless or filed in bad faith.

Appellant's third point of error is overruled.

D. Point No. 4: Whether the trial court's sanctions violate double jeopardy protections of the Texas and United States constitutions.

[13] Appellant argues that he was subjected to constitutionally impermissible double jeopardy because he was subjected to a Rule 13 sanction after he was twice held in contempt for his conduct in the underlying trial.

[14][15] Federal and state constitutional due process provisions are identical. Phillips v. State 7878 S.w.2d 391, 393 n. 2 (Tex. Crim.App. 1990); Gongora v. State, 916 S.W.2d 570, 576 (Tex. App.— Houston [1st Dist.] 1996, pet. ref'd). The double jeopardy clause of the fifth amendment prohibits:

> (1) a second prosecution for the same offense after acquittal;
> (2) a second prosecution for the same offense after conviction; and
> (3) multiple punishments for the same offense.

Id at 576.

Here, appellant contends he was entitled to double jeopardy protection under state and federal law because "the sanctions proceeding had many of the aspects of a criminal contempt proceeding and [appellant] could have been punished by incarceration, had Judge Brister chosen to do so." His argument is that, because he was held in contempt for his conduct at trial

and was subsequently sanctioned under Rule 13, he was punished more than once for the same criminal offense.

[16] We disagree. While appellant was held in contempt earlier for his conduct during trial, this Rule 13 proceeding dealt with actions he took before trial. Judge Brister specifically noted in several parts of the Sanction Order that appellant's actions during and after trial were not sanctionable, but merely indicative of appellant's bad faith intent prior to trial in filing groundless pleadings for Metzger. The Double Jeopardy Clause does not bar the use of evidence from one offense to establish intent in a separate offense. United States v. Felix, 503 U.S. 378, 386-87, 112 S.Ct. 1377, 1382-83, 118 L.Ed.2d 25 (1992). Appellant is not being punished more than once for the same offense; his fourth point of error is overruled.

E. Point No. 5: Whether the trial court abused its discretion in imposing Rule 13 sanctions against appellant.

[17] Appellant contends that Judge Brister abused his discretion in assessing Rule 13 sanctions against him. As an initial matter, appellant argues, without citing any authority, that this Court should employ a directed verdict standard to review the facts available to him when he signed various pleadings for his client in the underlying trial. Under a directed verdict standard, we would "view the evidence in the light most favorable to the party against whom the verdict was rendered and disregard all contrary evidence and inferences." Qantel Bus. Sys. v. Custom Controls Co., 761 S.W.2d 302, 303 (Tex. 1988). As discussed earlier, however, we review Rule 13 sanctions for abuse of discretion; appellant is urging the wrong standard of review. He also attacks the trial court's findings on the apparent theory that the order should be overturned if some of the factual findings of the court were in error. However, a trial court's Rule 13 Sanction Order must be upheld if any of the facts set forth by the court supports the sanctions. See, e.g. Monroe, 884 S.W.2d

at 816 n. 3, 819 (Tex. App.— Dallas 1994, writ denied) (upholding sanctions when five of seven fact findings supported the sanctions); New York Underwriters Ins. Co. v. State Farm Mut. Auto, Ins. Co., 856 S.W.2d 194, 205 (Tex. App.— Dallas 1993, no writ) (judgment imposing sanctions will be upheld" on any applicable theory that finds support in the record").

Rather than undertake to refute appellant's contentions on a point-by-point basis, we instead address those findings that support a Rule 13 sanction.

1. Whether appellant's claims are groundless.
Appellant was the attorney of record for Metzger's second, third, fourth, and fifth amended petitions and for Metzger's response to the defendants' motion for summary judgment. Thus, under Rule 13's first and third sentences, appellant is subject to sanctions for pleadings he signed on Metzger's behalf if those pleadings are groundless and he signed them in bad faith. TEX. R. CIV. P. 13.

[18] Rule 13's second paragraph defines "groundless" as
(1) "no basis in law or fact"; and
(2) "not warranted by good faith argument for the extension, modification, or reversal of existing law."

Id. Before Judge Brister was directed to conduct this sanction dispute, this Court had already conclusively determined that none of Metzger's claims, as appellant articulated them, had a basis in law or fact. [FN3] The only issue properly before Judge Brister with respect to the groundlessness of the pleadings appellant filed for Metzger was whether there was a "good faith argument for the extension, modification, or reversal of existing law" when appellant signed the pleadings.

FN3. Specifically, we concluded in the appeal from the underlying judgment that Judge West's directed verdict

> on all of the client Metzger's claims was proper "because (1) some were not viable to begin with, and (2) there was no evidence to support the ones that were viable." Bradt, 892 S.W.2d at 64 (summarizing the Court's analysis of claims in Metzger v. Sebek, 892 S.W.2d 20 (Tex.App.— Houston [1st Dist.] 1994, writ denied)). Furthermore, we determined there was "abundant evidence" of probable cause against Metzger, which obviated his malicious prosecution claim, and held that each of Metzger's conspiracy claims was unproved after more than a month of trial. Metzger, 892 S.W.2d at 43-47. Our opinion also affirmed Judge West's ruling dismissing Metzger's RICO claim and held that Metzger had failed to prove an essential element of his infliction of emotion distress claim. Id. at 47-48. Judge Brister expressly took judicial notice of the findings of this Court in the Sanction Order.

Appellant's following arguments could be construed as attempts to articulate a good faith argument for the extension or change of law existing at the time he drafted Metzger's pleadings.

> a. The duty of mental health professionals to the parents of patients for negligent misdiagnosis.

[19] Appellant argues that, at the time he filed Metzger's pleadings, he made a good faith argument in asserting that mental health professionals owe a duty to the parent not to negligently misdiagnose a child patient's condition. He cites W.C.W. v. Bird, 840 S.W.2d 50, 56 (Tex.App.— Houston [1st Dist.] 1992), rev'd, 868 S.W.2d 767 (Tex. 1994), and James v. Brown, 637 S.W.2d 914, 916-18 (Tex. 1882). Assuming appellant's claim of negligent misdiagnosis had a good faith legal basis, however, Judge Brister found that a cursory investigation of the facts would have revealed that Metzger could not show actionable negligence. We noted in our previous opinion that

ample evidence gave probable cause to the professionals examining Metzger's son that the boy had been sexually molested and that Metzger was implicated. [FN4] The child's bizarre and disturbing behavior, detailed in our previous opinion, was fatal to a good faith allegation that any of the defendants breached a duty by negligently misdiagnosing Metzger's son.

> FN4. Specifically, this Court found that "Metzger was strongly implicated in the sexual abuse of [his son] by (1) court appointed psychologist] Guez, after observing and evaluating [Metzger's son]; (2) [his former wife] Sebek after speaking with [Metzger's son]; and (3) [the son] himself, who implicated him on several occasions." Metzger, 892 S.W.2d at 43.

b. Negligent infliction of emotional distress.

[20][21] Judge Brister cited Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993), for the proposition that negligent infliction of emotion distress is not recognized in Texas. Appellant points out that the court of appeals opinion in Boyles had recognized such a claim and argues that he could not have known that the Texas Supreme Court would overrule Boyles in 1993. However, outrageous conduct is a necessary element of claims for both negligent and intentional infliction of emotional distress. Massey v. Massey, 807 S.W.2d 391, 399 (Tex.App.—Houston [1st Dist.] 1991). writ denied per curiam, 867 S.W.2d 766 (Tex. 1993). After more than a month in trial to prove outrageous conduct, appellant failed to provide any evidence of this essential element of Metzger's claim. Metzger, 892 S.W.2d at 39, 48. Therefore, appellant has not articulated a good faith basis for such a claim under these facts.

c. Cause of action against opposing counsel for representing opposing party in a judicial proceeding.

[22] Judge Brister cited Bradt v. West, 892 S.W.2d 56, 71-72 (Tex.App.— Houston [1st Dist.] 1994, writ denied), for the proposition that a party has no cause of action against opposing counsel for representing an opposing party. Appellant contends Bradt's holding on this subject was limited to the conclusion that an attorney has no cause of action against an opposing party's attorney and that it was Metzger, the client, who sued opposing counsel. Additionally, appellant complains that Bradt was decided after Metzger's pleadings were filed.

However, Judge Brister cited Bradt v. West for its discussion of cases supporting the proposition that there is no cause of action against opposing counsel for representing a client in a judicial proceeding, and those cases predate appellant's pleadings. See id. at 71. Appellant had before him ample precedent to recognize that Texas case law frown on suing opposing counsel simple for representing a party in a judicial proceeding. See, e.g., Morris v. Bailey, 398 S.W.2d 946, 947 (Tex. Civ. App. — Austin 1966, writ ref'd n.r.e.): accord Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ). Appellant has provided no relevant authorities in support of this cause of action.

d. Cause of action for torticus conspiracy.

[23] Judge Brister found that many of the alleged conspirators had never met each other, much less participated in regular meetings or communications in furtherance of a conspiracy. Appellant cites cases stating the undisputed proposition that an agreement may be informal and tacit and that a civil conspiracy can be established by circumstantial evidence. See, e.g., International Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 581-82 (Tex. 1963); Bourland v. State, 528 S.W.2d 350, 354-55 (Tex. Civ.App. — Austin 1975, writ ref'd n.r.e.) Judge Brister's finding, however, turned on the complete lack of

evidence to support appellant's allegations of conspiracy. Appellant's cases do not support a good faith extension of the law to impose liability on unrelated parties who are not in agreement with each other.

[24][25] Additionally, conspiracy is not an independent, actionable claim. As the Texas Supreme Court has observed:

> Civil conspiracy, generally defined as a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means, might be called a derivative tort... That is, a defendant's liability for conspiracy depends on participation is some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable.

Tilton v. Marshall, 925 S.W.2d 672, 681 (Tex. 1996). Therefore, even if he had been able to show some sort of tacit agreement between the defendants, appellant's inability to articulate even one actionable underlying tort claim is fatal to his conspiracy allegations. See, e.g., Hoggett v. Brown, 971 S.W.2d 472, 493 (Tex. Houston [14th Dist.] 1997, pet. denied) (concluding there was no actionable conspiracy claim once the court had determined the defendants did not owe a fiduciary duty to the plaintiff because "a defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of named defendants liable").

e. Standing to assert RICO claim.

[26] Judge Brister found the RICO claim was groundless because Metzger lacked standing. Appellant summarily states

that Metzger had standing to assert a RICO claim because the defendants billed his insurance carrier and Metzger personally paid bills that were incurred, pursuant to an ongoing criminal enterprise. Appellant also argues the bills Metzger's insurance company paid constitute injury to Metzger. We earlier expressly determined, however, that Metzger lacked standing because he failed to show in the "record that he was injured in his business or property by any predicate act of racketeering activity." Metzger, 892 S.W.2d at 47. It was this failure to establish any underlying, predicate racketeering activity that was fatal to the issue of standing.

[27] Appellant also mentions evidence related to a Medicare Fraud Control Unit Report (without citing to the record) that he claims would have supported his allegations of a criminal enterprise, had Judge West not prevented him from exploring the issue. In considering whether a claim is groundless within the meaning of Rule 13, we do examine inadmissible evidence. See, e.g., Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634, 637 (Tex. 1989). Nevertheless, appellant does not establish a good faith basis to argue that Metzger had standing to pursue a RICO claim by making unsupported assertions on appeal that he was prevented from exploring unidentified evidence that he summarily claims might have shown racketeering activity by the defendants.

For all the reasons discussed above, Metzger failed to establish a good faith basis for changing the underlying law. Therefore, we find that Judge Brister did not abuse his discretion in determining that all of the claims articulated by appellant for Metzger are groundless.

2. Whether appellant brought his pleadings in bad faith.

[28] Because Judge Brister's order did not err in finding that appellant's pleadings were groundless, Rule 13 sanctions are warranted if the pleadings were asserted in bad faith or for the purpose of harassment.

Judge Brister made numerous persuasive findings of bad faith. First, he noted that appellant personally sued the defendants, their attorneys and insurers, and court personnel, following Judge West's directed verdict in the underlying trial. [FN5] Judge Brister noted that, although this subsequent spate of litigation was not sanctionable in the dispute before him concerning appellant's pre-trial conduct it was evidence of bad faith. Judge Brister also observed that, as of the time of the underlying trial, appellant had failed to take the deposition of even one of the defendants. Judge Brister found that (1) even a cursory inquiry would have revealed that the defendants had not met or communicated in furtherance of a conspiracy; (2) that the term "rule out" (as used in reference to the possibility that Metzger's son had been sexually abused) was not exculpatory, as appellant had maintained through the time of Judge Brister's Rule 13 sanction hearing, but rather meant that a possible diagnosis of sexual abuse should be considered; and (3) that Defendant Cox, who was sued for allegedly implicating Metzger before a grand jury in the sexual abuse of his son, had actually testified to the contrary—that Metzger's conduct was inconsistent with that of a sex offender.

FN5. The Sanction Order states that appellant brought two actions following the directed verdict—first in federal court and then a subsequent suit in state court. In fact, appellant personally brought suit only in state court against Judge West, the defendants, their attorneys, and insurers, and the contempt prosecutor.

> See Bradt, 892 S.W.2d at 65. In federal court, however, appellant brought suit on behalf of Metzger against the defendants, Metzger's former wife, and the prosecutor who prosecuted Judge West's contempt charge. Id. at 64. Nevertheless, any error in this misstatement is harmless. The overarching fact of importance is that appellant personally sued the other parties, their counsel, and the court personnel. Under these facts, Judge Brister did not abuse his discretion in finding this behavior indicative of appellant's bad faith and intent to harass in filing Metzger's pleadings prior to trial.

As discussed earlier, appellant alleges (without citing to the record) that he could have proved a conspiracy if he had been allowed to pursue excluded evidence. Nevertheless, the record clearly reflects appellant failed to show any evidence of a conspiracy. Moreover, he does not substantively contest his misunderstanding at trial of either the term "rule out" or the relatively favorable testimony of Defendant Cox. [FN6] Judge Brister had ample basis to find that the pleadings appellant signed were not made after reasonable inquiry, as required by Rule 13.

> FN6. Appellant continues to suggest, without explanation, that he fairly characterized Defendant Cox's testimony as unfavorable to Metzger. But under questioning at his Rule 13 hearing before Judge Brister, appellant failed to provide a single instance in which the record reflected Cox gave testimony that would constitute a basis for a cause of action.

Judge Brister found that, as a consistent pattern of conduct, appellant violated Judge West's motion in limine. Judge Brister noted our finding in Metzger that "Metzger's attorneys repeatedly violated the order in limine; violated other orders of

the court; interrupted the judge; grumbled audibly about rulings; [and] laughed at the judge." Metzger, 892 S.W.2d at 39. However, Judge Brister expressly noted that this conduct was not itself sanctionable in the Rule 13 dispute before him, but rather evinced appellant's bad faith prior to trial in filing Metzger's pleadings.

Judge Brister also found that the allegations of a vast conspiracy, the evidence that none of the defendants had accused Metzger of sexual abuse or sought his indictment, and the surrounding context of Metzger's divorce and child custody proceeding all should have alerted appellant that Metzger's motivation was to exact revenge against his former wife and others who got involved in their dispute. Finally, Judge Brister found that the large number of defendants (whom appellant barely investigated to determine whether they actually did any of the acts alleged) and the protracted trial proceedings, which lasted for more than a month, based in part on appellant's elicitation of often irrelevant information, all indicated that appellant's purpose in filing suit was to harass the defendants.

Appellant has provided this court with no valid argument or authority to show that Judge Brister abused his discretion in concluding that appellant's intent was to abuse or harass the defendants in bad faith with frivolous claims.

3. Whether the $100,000 sanction was proportionate to the harm.

[29] Having concluded that Judge Brister did not abuse his discretion in determining that the pleadings signed by appellant were groundless and brought in bad faith or to harass the defendants, the only issues remaining are (1) whether the $100,000 sanction imposed is directly related to the offensive

conduct and (2) whether the amount is excessive. TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991).

Appellant was the attorney of record on Metzger's second, third, fourth, and fifth amended petitions in state court, yet failed to nonsuit even one defendant or drop any of Metzger's groundless claims. Judge Brister's order found (and appellant does contest) that defendants' fees and expenses after Metzger signed a false affidavit opposing the defendants' motion for summary judgment (which alone accounts for the fact that Metzger's claims proceeded to trial) totaled nearly one million dollars. Appellant should have known early on that Metzger's claims were groundless. Metzger's untenable claims resulted in approximately ten times more expense to the defendants than appellant was fined. Thus, appellant and Metzger were each fined only a fraction of the cost they forced the defendants to incur.

[30] If anything, appellant's sanction was disproportionately small. In our previous opinion, we reversed Metzger's sanction because we deemed it excessive that Metzger, who is not an attorney, should be made to bear the full expense of the defendants' costs incurred because of his one independently sanctionable act, i.e. the signing of an affidavit containing intentionally false information. Rather, we determined that Metzger should be fined a smaller amount because he was responsible under Rule 13 only for his individual affidavit, not the pleadings as a whole. See Metzger, 892 S.W.2d at 52-54. In particular, we noted that "in assessing sanctions for violating rule 13, a party should not be punished for its counsel's conduct 'unless the party is implicated apart from having entrusted its legal representation to council,'" Id. at 51 (quoting from Glass' v. Glass, 826 S.W.2d 683, 687 (Tex.App.— Texarkana 1992, writ denied)). Thus, a party may be subject to a smaller subsection of sanctionable conduct under Rule 13 than his

attorney; the party must be implicated for his unique conduct separate from the attorney's representation, while the attorney may be generally liable for each groundless pleading.

Here, where all of the pleadings appellant filed on Metzger's behalf are groundless, appellant was responsible for each such pleading, while Metzger was independently at fault only for signing an affidavit for which he intentionally supplied false information.

We previously reversed the sanction against appellant solely because of his motion to recuse Judge West. See id at 49-50. Appellant, an experienced attorney, should have known that Metzger's pleadings were groundless as a matter of law. Judge Brister temperately--indeed, charitably--sanctioned appellant for no more that the amount Metzger was sanctioned, approximately ten percent of the costs incurred by the defendants after Metzger's false pre-trial affidavit that defeated the defendants' motion for summary judgment.

Appellant's fine was, therefore, directly related to his abusive pleading practices and was by no measure disproportionately large to the harm appellant inflicted.

The Sanction Order specifically attributes the waste of time and money incurred by the defendants to appellant's frivolous pleadings.

The trial court did not abuse its discretion in assessing a $100,000 fine against appellant.

Appellant's fifth point of error is overruled.

F. Point No. 6: Whether the trial court's Sanction Order is void for lack of particularity.

[31] Appellant argues that Judge Brister's Sanction Order fails for lack of specificity. A Rule 13 sanction order must state with particularity "good cause for finding that [appellant's] pleadings were groundless and not brought in good faith or groundless and not brought in good faith or groundless and brought for purposes of harassment," or else there is abuse of discretion. Johnson v. Smith, 857 S.W.2d 612, 617 (Tex.App.— Houston [1st Dist.] 1993, no writ).

[32] Appellant's argument appears to be that if any finding of the trial court was in error, the entire order is void. "[A] trial court's failure to make particular findings in a rule 13 order may constitute harmless error when the trial court's findin *770 of fact and conclusions of law supple the particulars of good cause required by rule 13." Gorman v. Gorman 966 S.W.2d 858, 867-68 (Tex.App.— Houston [1st Dist] 1998, pet. denied). Here, Judge Brister expressly took judicial notice of this Court's determination that all of appellant's arguments were flawed "because (1) some were not viable to begin with, and (2) there was no evidence to support the ones that were viable." Bradt, 892 S.W.2d at 64. The Sanction Order independently set out factual findings and conclusions of law regarding the claims.

In assessing the sanctions, Judge Brister specifically noted, among other findings, that "appellant was informed of the obvious legal impediments to Plaintiff's claims, knew of the questionable evidence contrary to those claims, [and] took a shotgun approach to joining parties without further consideration." Appellant argues at one point, however, that Judge Brister erred in finding that he frivolously joined "parties," when appellant joined only one party. Any alleged error from this factual finding is harmless; the Sanction Order adequately sets out with particularity factual findings that adequately provide good cause for sanctioning appellant for attorney's fees. See, e.g., Gorman, 966 S.W.2d at 867-68. [FN7]

FN7. In any case, it is undisputed that appellant filed the second, third, fourth, and fifth amended petitions in state court, and responded to the defendants' motion for summary judgment, without nonsuiting the many defendants who fell within the ambit of Metzger's allegations.

The defendants on appeal have requested that we also sanction appellant for frivolously filing this appeal. Although appellant's pleadings in the court below on Metzger's behalf were indeed groundless, appellant has urged several issues that at least colorable, though not warranting reversal. Under these facts, we do not sanction appellant for filing this appeal.

In accordance with a joint motion of Bradt and appellee Judy Sebek following a settlement between them, this Court issued a June 3, 1999 interlocutory order reversing the award of sanctions in favor of Sebek and rendering a take-nothing judgment as to her.

We affirm the judgment as to the remaining defendants.

END OF DOCUMENT

APPENDIX C

MICHAEL H. SCHNEIDER
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MARGARET G. MIRABAL
MICHOL O'CONNOR
DAVIE L. WILSON
ADELE HEDGES
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RE: Court of Appeals Number: 01-96-00943-CV
Trial Court Case Number: 9053676

Style: Bradt, L.T.
v.
Sebek, Judy, et al

April 7, 2000
Re: 01-96-00943-CV

The Court today, DENIED both appellant's motion for rehearing and motion for rehearing en banc in the above referenced cause.

Respectfully yours,
Margie Thompson, Clerk

/s/ Joann Aguirre
Joann Aguirre, Chief Deputy

APPENDIX D

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

August 10, 2000

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RE: Case Number 00-0524
Court of Appeals Number: 01-96-00943-CV
Trial Court Number: 90-53676

Style: L.T. Bradt
v.
JUDY SEBEK, EARLE LILLY, PIRO & LILLY, DEPELCHIN CHILDREN'S CENTER, BAYLOR COLLEGE OF MEDICINE, ERNEST KENDRICK, MICHAEL D. COX, JEAN GUEZ, BARBARA TEYLORK LUISA MARIA ACEVEDO LOHNER, ANN M. HODGES and JOEL A. NASS

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by Julio C. Alvarado
Julio C. Alvarado, Deputy

cc: Ms. Margie Thompson, Clerk
Mr. Charles Bacarisse

APPENDIX E

THE SUPREME COURT OF TEXAS
Post Office Box 12248
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September 28, 2000

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RE: Case Number 00-0524

Court of Appeals Number: 01-96-00943-CV

Trial Court Number: 90-53676

Style: L.T. BRADT
v.
JUDY SEBEK, EARLE LILLY, PIRO & LILLY, DEPELCHIN CHILDREN'S CENTER, BAYLOR COLLEGE OF MEDICINE, ERNEST KENDRICK, MICHAEL D. COX, JEAN GUEZ, BARBARA TAYLOR, LUISA MARIA ACEVEDO LOHNER, ANN M. HODGES and JOEL A. NASS

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing of the above styled petition for review.

Sincerely,

John T. Adams, Clerk

by Blanca E. Morin
Blanca E. Morin, Deputy

cc: Ms Margie Thompson, Clerk
Mr. Charles Bacarissee

Supreme Court, U.S.
FILED
00 1082 DEC 27 2000
OFFICE OF THE CLERK

No._____

IN THE

Supreme Court of the United States

October Term 2000

L.T. BRANT,
Petitioner,
v.
EARLE LILLY, PIRE & LILLY, P.C., DEPELCHIN CHILDREN'S CENTER, BAYLOR COLLAGE of MEDICINE, EARNEST KENDRICK, MICHAEL D. COX, JEAN GUEZ, BARBARA TAYLOR, LUISA MARIA ACEVEDE LOHNER, ANN M. HODGES AND JOEL A. NASS,
Respondent.

APPENDICES TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

APPENDICES F-G-H-I

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APPENDIX F

NO. 90-53676

Mark Metzger, Plaintiff,	§	IN THE DISTRICT
	§	COURT OF
	§	
V.	§	HARRIS COUNTY,
	§	TEXAS
	§	
JUDY METZGER, et al., Defendants.	§	269TH JUDICIAL
	§	DISTRICT

SHOW CAUSE ORDER

WHEREAS L. T. Bradt was attorney for the plaintiff during trial of Cause No. 90-53676 in the 269th District Court, Harris County, Texas, styled Mark Metzger v. Judy Metzger, et al., and

WHEREAS, on April 2, 1992, the Court granted item number XVI in the Defendants' Joint Motion in Limine filed in that cause, and thereby ordered that counsel for the plaintiff and his witnesses refrain "from mentioning or offering any evidence or testimony that plaintiff has offered to, taken or passed a lie detector test," without first obtaining a ruling "by the Court as to the competency of each matter outside of the presence and hearing of any members of the Jury or Jury Panel"; and the Court also thereby ordered that counsel for the plaintiff "apprise each of plaintiff's witnesses of the contents" of the joint motion in limine, "to the end that such Motion not be inadvertently violated by a witness," and

WHEREAS L. T. Bradt thereafter violated the order in limine during voir dire examination of the jury and his opening

statement, by making reference to the plaintiff having submitted to a polygraph or "lie detector" test, and was admonished by the Court with regard to that violation of the Court's order; and

Count One.

WHEREAS L. T. Bradt intentionally, knowingly and recklessly violated said order during his examination of witness Marie Munier on April 10, 1992, by eliciting testimony from her in the presence of the jury concerning a polygraph test administered to the plaintiff, when he knew and should have known that his question to said witness was calculated to elicit such testimony, and after he failed to apprise said witness of the Court's order in limine pertaining to testimony regarding a polygraph examination; and

WHEREAS said violation of the Court's order in limine obstructed the orderly progress of the trial, and obstructed the Court in the administration of justice; and

Count Two

WHEREAS L. T. Bradt thereafter intentionally and knowingly violated the above-described order in limine during his examination of witness Marie Munier on April 10, 1992, by writing the words "negative polygraph" on a large pad of paper in the courtroom, in full view of the jury, and

WHEREAS said violation of the Court's order in limine obstructed the orderly progress of the trial, and obstructed the Court in the administration of justice; and

Count Three.

WHEREAS L. T. Bradt thereafter intentionally and knowingly violated the above-described order in limine during

his examination of witness Marie Munier on April 10, 1992, by referring again in the presence of the jury to a polygraph examination, in a subsequent question addressed to that witness, and

WHEREAS said violation of the Court's order in limine obstructed the orderly progress of the trial, and obstructed the Court in the administration of justice; and

WHEREAS the Court therefore adjudged L. T. Bradt to be guilty of a contempt of court, on account of the foregoing violations of the Court's order in limine, and assessed his punishment at confinement in the Harris County Jail for thirty days and payment of a $500 fine; and

WHEREAS L. T. Bradt, as an attorney and officer of the court, moved for a determination of his guilt or innocence of contempt of court by a judge of a court that is not the offended court, pursuant to § 21.002(d), Texas Government Code;

NOW, THEREFORE, it is ordered by this Court that the said L. T. Bradt show cause why he should not be adjudged guilty of contempt of court as alleged in each of the three foregoing counts of contempt of court, and punished therefore, and he shall do so by appearing before such judge as may be designated by the presiding judge of the administrative judicial region, in the courtroom of the 269th District Court, Harris County, Texas, on September 15, 1992, at 9:00 A.M./P.M., for a hearing to show facts, if any exist, that deny or excuse said contempt.

And it is further ORDERED that the clerk of this Court shall issue notice to show cause, commanding the said L. T. Bradt to appear and show cause in the manner and at the time specified in this order, why he should not be held in contempt of the 269th District Court, Harris County, Texas, and punished

therefore; and a copy of this order shall accompany said notice, and the Clerk shall issue appropriate citation for the service of said notice.

Signed this 18 day of Aug, 1992.

/s/ David West

JUDGE PRESIDING
269th District Court
Harris County, Texas

APPENDIX G
90-53676

MARK METZGER	§	IN THE DISTRICT
Plaintiff	§	COURT OF
VS.	§	
	§	
JUDY SEBEK, EARLE LILLY	§	
PIRO & LILLY, P.C.,	§	HARRIS COUNTY,
DEPELCHINE CHILDREN'S	§	TEXAS
CENTER, BAYLOR COLLEGE	§	
OF MEDICINE, ERNEST	§	
KENDRICK, MICHAEL D.	§	
COX, JEAN GUEZ, BARBARA	§	
TAYLOR, LUISA MARIA	§	
ACEVEDO LOHNER, ANN M.	§	
HODGES and JOEL A. NASS	§	269TH JUDICIAL
Defendants	§	DISTRICT

The record reveals that the above styled and numbered cause was called for trial on March 32, 1992 and there after proceeded in trial until May 15, 1992.

Prior to commencing voir dire, and the selection of the jury, an examination of the exhibits proposed by the parties, to be offered for admission in evidence, were marked. Some of them were ruled upon by the Court for admission into evidence without objection. One such exhibit was Baylor Exhibit No. 1 which contained a copy of the polygraph test made the basis of this contempt proceeding. This exhibit was admitted into evidence for all purposes, by the Court, without objection.

The evidence shows that a pleading styled "Defendants' Joint Motion in Limine" was filed on March

30, 1992 containing XXXIII matters including a paragraph numbered XVI G. That paragraph referenced the results of a lie detector test and requested that it be excluded from the trial of the case.

The evidence also shows an exhibit styled "Order On Defendants' Joint Motion In Limine" signed by Judge West on April 2, 1992 reflecting "XVI GRANTED ____."

The trial, with the jury seated, commenced and thereafter on April 10, 1992 the Respondent, L. T. Bradt, elicited testimony from witness Marie Munier with reference to the polygraph test and also wrote a reference to the results of that test on a poster in view of the jury.

On April 23, 1992, counsel who offered, and had admitted into evidence without objection, Baylor exhibit No. 1 moved the Court to withdraw from that exhibit the pages reflecting the result of the polygraph test in question.

A judgment was signed on the 21st day of May, 1992.

The Respondent, L. T. Bradt, filed a motion for new trial. Thereafter, he filed a motion requesting that Judge David West recuse himself.

On July 1, 1992 Judge West, in a signed order, declined to recuse himself and requested the Presiding Judge of the 2nd Administrative Judicial Region of Texas to assign another judge to hear the motion for recusal.

On August 18, 1992 Judge West signed an order reflecting the Respondent, L. T. Bradt, guilty of contempt and assessed punishment as a $500.00 fine and 30 days confinement in the Harris County jail.

Respondent, L. T. Bradt, then moved for the determination of guilt or innocence of the contempt of court by a judge other than the offended court in accordance with Section 21.002 of the Texas Government Code.

On September 15, 1992 Judge Thomas J. Stovall, Jr., the Presiding Judge of the 2nd Administrative Judicial Region of Texas assigned Arthur C. Lesher, Jr., a Senior District Judge, to determine the guilt or innocence of Respondent, L. T. Bradt.

Thereafter, on November 30, 1992 came on for hearing the matter assigned to Arthur C. Lesher, Jr. All parties were present and announced ready.

The State's attorney announced to the Court that the State of Texas was abandoning the allegations contained on page one of the Show Cause Order signed on August 18, 1992, to wit,

> "WHEREAS L. T. Bradt thereafter violated the order in limine during voir dire examination of the jury and his opening statement, by making reference to the plaintiff having submitted to a polygraph or 'lie detector' test ...."

After hearing and examining the evidence introduced, the Court is of the opinion that the Respondent, L. T. Bradt, is entitled to a dismissal of the contempt charges made against him, and it is so ordered.

Signed this 4th day of December, 1992.

s/
ARTHUR C. LESHER, JR.
SENIOR DISTRICT JUDGE PRESIDING

APPENDIX H

VERNON'S TEXAS RULES ANNOTATED
TEXAS RULES OF CIVIL PROCEDURE
PART I. GENERAL RULES

Rule 13. Effect of Signing of Pleadings, Motions and Other Papers; Sanctions

The signature of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanctions available under Rule 215-2b, upon the person who signed it, a represented party, or both.

Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

RULE 215. ABUSE OF DISCOVERY; SANCTIONS

1. Motion for Sanctions or Order Compelling Discovery. A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:

a. Appropriate Court. On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.

b. motion.

(1) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules 200-2b, 201-4 or 208; or

(2) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:

(a) to appear before the office who is to take his deposition, after being served with a proper notice;

(b) to answer a question propounded or submitted upon oral examination or upon written questions; or

(3) if a party fails:

(a) to serve answers or objections to interrogatories submitted under Rule 168, after proper service of the interrogatories; or

(b) to answer an interrogatory submitted under Rule 168; or

(c) to serve a written response to a request for inspection submitted under Rule 167, after proper service of the request; or

(d) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 167; the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apple to the court in which the action is pending for the imposition of any sanction authorized by paragraph 2b herein without the necessary of first having obtained a court order compelling such discovery.

When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 166b.

c. Evasive or Incomplete Answer. For purposes of this subdivision an evasive r incomplete answer is to be treated as a failure to answer.

d. Disposition of Motion to Compel: Award of Expenses. If the motion is granted, the court shall, after

opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.

e. Providing Person's Own Statement. If a party fails to comply with any person's written request for the person's own statement as provided in paragraph 2(g) of Rule 166b, the person who made the request may move for an order compelling compliance with paragraph 2(g) of Rule 166b. If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are

reasonable in relation to the amount of work reasonably expended in obtaining the order.

2. Failure to Comply with Order or with Discovery Request.

a. Sanctions by Court in District Where Deposition is Taken. If a dependent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

b. Sanctions by Court in Which Action if Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rules 200-2b, 201-4 or 208 to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167a, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) An order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) An order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

(7) When a party has failed to comply with an order under Rule 167(a) requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

c. *Sanction Against Nonparty for Violation of Rule 167.* If a nonparty fails to comply with an order under Rule 167, the court which made the order may treat the failure to obey as contempt of court.

3. **Abuse of Discovery Process in Seeking, Making, or Resisting Discovery**. If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of paragraph 2b of this rule. Such order of sanction shall be subject to review on appeal from the final judgment.

4. Failure to Comply with Rule 169.

(a) Deemed Admission. Each matter of which an admission is requested shall be deemed admitted unless, within the time provided by Rule 169, the party to whom the request is directed serves upon the party requesting the admissions a sufficient written answer or objection in compliance with the requirements of Rule 169, addressed to each matter of which an admission is requested. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer.

b. Motion. The party who has requested the admission may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule 169, it may order either that the matter is admitted or that an amended answer be served. The provisions of paragraph d of subdivision 1 of this rule apply to the award of expenses incurred in relation to the motion.

c. Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any

matter as requested under Rule 169 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 169(1), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

5. Failure to Respond to or Supplement Discovery. A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

6. Exhibits to Motions and Responses. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.

TEXAS CIVIL PRACTICE AND REMEDIES CODE

§ 9.001. Definitions

In this chapter:

(1) "Claimant" means a party, including a plaintiff, counterclaimant, cross-claimant, third-party plaintiff, or intervenor, seeking recovery of damages. In an action in which a party seeks recovery of damages for injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes both that other person and the party seeking recovery of damages.

(2) "Defendant" means a party, including a counterdefendant, cross-defendant, or third-party defendant, from whom a claimant seeks relief.

(3) "Groundless" means:

(A) no basis in fact; or

(B) not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(4) "Pleading" includes a motion.

§ 9.002. Applicability

(a) This chapter applies to an action in which a claimant seeks:

(1) damages for personal injury, property damage, or death, regardless of the legal theories or statutes on the basis of which recovery is sought, including an

action based on intentional conduct, negligence, strict tort liability, products liability (whether strict or otherwise), or breach of warranty; or

(2) damages other than for personal injury, property damage, or death resulting from any tortious conduct, regardless of the legal theories or statutes on the basis of which recovery is sought, including libel, slander, or tortious interference with a contract or other business relation.

(b) This chapter applies o any party who is a claimant or defendant, including but not limited to:

(1) a county;
(2) municipality:
(3) a public school district;
(4) a public junior college district;
(5) a charitable organization;
(6) a nonprofit organization;
(7) a hospital authority;
(8) a hospital authority;
(9) any other political subdivision of the state; and
(10) the State of Texas.

(c) In and action to which this chapter applies, the provisions of this chapter prevail over all other law to the extent of any conflict.

§ 9.003. Texas Rules of Civil Procedure

This chapter does not alter the Texas Rules of Civil Procedure or the Texas Rules of Appellate Procedure.

§ 9.004. Applicability

This chapter does not apply to the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) or to Chapter 21, Insurance Code.

SUBCHAPTER B. SIGNING OF PLEADINGS

§ 9.011. SIGNING OF PLEADINGS

The signing of a pleading as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry, the pleading is not:

(1) groundless and brought in bad faith;
(2) groundless and brought for the purpose of harassment; or
(3) groundless and interposed for any improper purpose, such as to cause unnecessary delay or needless increase in the cost of litigation.

§ 9.012. Violation; Sanction

(a) At the trial of the action or at any hearing inquiring into the facts and law of the action, after reasonable notice to the parties, the court may on its own motion, or shall on the motion of any party to the action, determine if a pleading has been signed in violation of any one of the standards prescribed by Section 9.011.

(b) In making its determination of whether a pleading has been signed in violation of any one of the standards prescribed by Section 9.011, the court shall take into account:

(1) the multiplicity of parties;

(2) the complexity of the claims and defenses;

(3) the length of time available to the party to investigate and conduct discovery; and

(4) affidavits, depositions, and any other relevant matter

(c) If the court determines that a pleading has been signed in violation of any one of the standards prescribed by Section 9.011, the court shall, not earlier than 90 days after the date of the determination, at the trial or hearing or at a separate hearing following reasonable notice to the offending party, impose an appropriate sanction on the signatory, a represented party, or both.

(d) The court may not order an offending party to pay the incurred expenses of a party who stands in opposition to the offending pleading if, before the 90th day after the court makes a determination under Subsection (a), the offending party withdraws the pleading or amends the pleading to the satisfaction of the court or moves for dismissal of the pleading or the offending portion of the pleading.

(e) The sanction may include one or more of the following:

(1) the striking of a pleading or the offending portion thereof;
(2) the dismissal of a party; or
(3) an order to pay to a party who stands in opposition to the offending pleading the amount of the reasonable

expenses incurred because of the filing of the pleading, including costs, reasonable attorney's fees, witness fees, fees of experts, and deposition expenses.

(f) The court may not order an offending party to pay the incurred expenses of a party who stands in opposition to the offending pleading if the court has, with respect to the same subject matter, imposed sanctions on the party who stands in opposition to the offending pleading under the Texas Rules of Civil Procedure.

(g) All determinations and orders pursuant to this chapter are solely for purposes of this chapter and shall not be the basis of any liability, sanction, or grievance other than as expressly provided in this chapter.

§ 10.001 CIVIL PRACTICE & REMEDIES CODE
Title 2

§ 10.001. Signing of Pleadings and Motions

The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry;

(1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

Added by Acts 1995, 74th Leg., ch. 137, § 1, eff. Sept. 1, 1995.

Section 2 of the 1995 Act provides:

"This Act takes effect September 1, 1995, and applies only to a pleading or motion in a suit commenced on or after that date. A pleading or motion in a suit commenced before the effective date of this Act is governed by the law applicable to the pleading or motion immediately before the effective date of this Act, and that law is continued in effect for that purpose.

§ 10.004. Violation; Sanction

(a) A court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.

(b) The sanction must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by other similarly situated.

(c) a sanction may include any of the following:

(1) a directive to the violator to perform, or refrain from performing, an act;

(2) an order to pay a penalty into court; and

(3) an order to pay to the other party the amount of the reasonable expenses incurred by the other party because of the filing of the pleading or motion, including reasonable attorney's fees.

(d) The court may not award monetary sanctions against a represented party for a violation of Section 10.001(2).

(e) The court may not award monetary sanctions on its own initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party or the party's attorney who is to be sanctioned.

(f) The filing of a general denial under Rule 92, Texas Rules of Civil Procedure, shall not be deemed a violation of this chapter.

Added by Acts 1995, 74th Leg., ch. 137, § eff. Sept. 1, 1995.

GOVERNMENT CODE

CHAPTER 21. GENERAL PROVISIONS

§ 21.001. Inherent Power and Duty of Courts.

(a) A Court has all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue the writs and orders necessary or proper in aid of its jurisdiction.

(b) A court shall require that proceedings be conducted with dignity and in an orderly and expeditious manner and control the proceedings so that justice is done.

(c) During a court proceeding a judge may not request that a person remove an item of religious apparel unless:

(1) A party in the proceeding objects to the wearing of the apparel; and

(2) the judge concludes that the wearing of the apparel will interfere with:

(A) the objecting party's right to a fair hearing; or

(B) the proper administration of justice; and

(3) no reasonable alternative exists under which the judge may:

(A) assure a fair hearing; and

(B) protect the fair administration of justice.

GOVERNMENT CODE

§ 21.002. Contempt of Court.

(a) Except as provided by Subsections (g) and (h), a court may punish for contempt.

(b) The punishment for contempt of a court other than a justice court or municipal court is a fine of not more than $500 or confinement in the county jail for not more than six months, or both such a fine and confinement in jail.

(c) The punishment for contempt of a justice court or municipal court is a fine of not more than $100 or confinement in the county or city jail for not more than three days, or both such a fine and confinement in jail.

(d) An officer of a court who is held in contempt by a trial court shall, on proper motion filed in the offended court, be released on his own personal recognizance pending a determination of his guilt or innocence. The presiding judge of the administrative judicial region in which the alleged contempt occurred shall assign a judge who is subject to assignment by the presiding judge other than the judge of the offended court to determine the guilt or innocence of the officer of the court.

(e) This section does not affect a court's power to confine a contemner to compel him to obey a court order.

(f) Article 42.033, Code of Criminal Procedure, and Chapter 157, Family Code, apply when a person is punished by confinement for contempt of court for disobedience of a court order to make periodic payments for the support of a child.

(g) A court may not punish by contempt an employee or an agency or institution of this state for failure to initiate any

program or to perform a statutory and adequately funded the program:

(1) if the legislature has not specifically and adequately funded the program; or

(2) until a reasonable time has passed to allow implementation of a program specifically and adequately funded by the legislature.

(h) A justice or municipal court may not punish by contempt a person who engages in conduct that violates an order of the court if the conduct of the person is delinquent conduct under Section 51.03(a)

(3), Family Code. The justice or municipal court shall refer the person to the juvenile court for engaging in the delinquent conduct.

CONSTITUTION OF THE UNITED STATES

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

The Texas Attorney General's
Medicaid Fraud Control Unit
1101 Camino LaCosta, Ste. 257
Austin, Texas 78751-3930
(512) 463-2011

INVESTIGATIVE REPORT FOR PROSECUTION ANALYSIS

Investigation of : Shamal Beltangady, M.D.
88 Hunter Ridge Drive
Glastonbury, Connecticut
Texas Medicaid Provider Number:
P08876263
(DePelchin Faith Home: Z000PM923)

MFCU Case Number: P-0387-499

1. INTRODUCTION

This case originated as a result of information from the Texas Department of Human Services (TDHS) and the National Heritage Insurance Company (NHIC) being forwarded to the Special Operations Section (SOS) of the Texas Attorney General's Medicaid Fraud Control Unit (MFCU) (Exhibit 1).

This report contains the findings of the investigation of Shamal Beltangady, M.D. Dr. Beltangady is a licensed physician specializing in the field of psychiatry, who now lives at 88 Hunter Ridge Drive in Glastonbury, Connecticut. Currently Dr. Beltangady is employed as a staff psychiatrist by the Institute of Living. 400 Washington, Hartford, Connecticut (Exhibit 2). Dr.

Beltangady is licensed in both Texas and Connecticut. Dr. Beltangady is of East Indian descent, born June 8, 1947, height 5 feet 3 inches with brown hair and brown eyes. She has no known criminal history.

Information obtained while conducting the field investigation at DePelchin Faith Home in Houston, Texas indicated the involvement of three individuals in a third party billing scheme which utilized Dr. Beltangady's Medicaid provider number without her knowledge. These individuals, employed by DePelchin Children's Center, are listed as follows:

1. Larry G. Cash, Business Director
2. Robert S. McKelvey, M.D., Medical Director
3. Robert E. Barker, Executive Director

DePelchin Children's Center is a Texas nonprofit which owns and operated the DePelchin Faith Home.

II. STATUTES/REGULATIONS VIOLATED OR CONSIDERED

TX P.C. § 37.10	Tampering With A Governmental Record
TX P.C. § 32.46:	Securing Execution of Document By Deception
TX P.C. § 31.03:	Theft
40 T.A.C. 29.1:	Claim Information Requirements
40 T.A.C. 29.501:	Additional Claim Information
40 T.A.C. 29.502	Authorized Physician Services
40 T.A.C. 1396(h)	Medicaid Fraud

III. INVESTIGATIVE METHODOLOGY AND RESULTS

Utilizing the Purchased Health Services Investigative Guideline and the Provider Payment History (MQ 510), a sample of forty-eight recipients who had been reported as having received services from D.r Beltangady was selected (Exhibit 3). Recipient histories (HRBR 423s) were ordered.

Upon receipt and examination of the recipient histories, a striking similarity was noted among most of the billed procedures. The majority of the recipients were seen as inpatient, but there were no billings by any hospital. It was further determined that all recipients were seen routinely each thirty-day period, every Monday, Wednesday, and Thursday. All of the recipients received exactly the same treatment on each day regardless of the recipient's diagnosis.

Sixty-five claims were examined and it was noted that each of the claims during a particular calendar month were identical. In fact, the explanation of services attached to each of the claims for a particular month was an identical photocopy (Exhibit 4).

While examining recipient histories another peculiarity was noted. On the first sample, the run dates were September 1, 1983 through September 22, 1987. However, none of the recipient histories contained any service date listed past November 28, 1986. It is believed that DePelchin's Medicaid billings stopped as a result of the "spell of illness" regulation which became effective September 1, 1986.

In October 1986 a bulletin was released by NHIC and distributed to Medicaid providers which outlined "spell of illness". A Title XIX "spell of illness" is a continuous period of hospital confinement. Successive periods of confinement are considered to be continuous unless the last date of discharge from any hospital and the next date of readmission to any hospital are separated by at least sixty consecutive days.

Medicaid will cover only services for thirty days of an impatient hospital stay per spell of illness. (Each spell of illness must be separated by at least sixty consecutive days between the date of discharge and the date of readmission.) After eligibility requirements are met, the recipient may receive benefits for hospital services furnished to them during each Title XIX spell of illness.

The Texas State Board of Medical Examiners was contacted to determine whether Dr. Beltangady's medical license was listed as active. It was determined to be active, and that it would remain so until May 31, 1988 (Exhibit 5).

On September 22, 1987 I called DePelchin Children's Center in Houston, Texas, (713) 861-8136, and asked to speak with Dr. Shamal Beltangady. I was informed that Dr. Beltangady had not been affiliated with DePelchin Children's Center since August 1984.

The Secretary of State's Office was contacted and the Articles of Incorporation for DePelchin Children's

Center were obtained, including amendments and lists of officers and board members (Exhibit 6).

An NHIC Mnemonic Inquiry was obtained utilizing the group provider number (Z000PM923) that was being used on all claims submitted to NHIC by DePelchin Children's Center. The names listed on the inquiry were Dr. Shamal Beltangady, Dr. Barbara J. Felkins, Dr. Theresa Blackburn, and Dr. Walter Schmalsteig. NHIC was contacted and Provider Enrollment. Applications were obtained for all of the doctors named (Exhibit 7).

Dr. Beltangady was employed at DePelchin Children's Center from July 1981 until August 31, 1984. Dr. Barbara Felkins was employed at DePelchin Children's Center from February 1, 1982 until August, 1985. Dr. Theresa Blackburn was employed at DePelchin Children's Center from August 12, 1981 until December 15, 1981. Dr. Walter Schmalsteig was employed at DePelchin Children's Center from October 1, 1983 until December 31, 1986. Although each of these physicians had a Medicaid provider number and were part of the group (Z000PM923), they did not provide the services for which Medicaid was billed.

On March 31, 1988 I obtained a second set of recipient histories with run dates from September 1, 1983 through March 30, 1988. While examining histories of thirty-two recipients for December 1987, it was found that every one of them received exactly the same services, and the amount billed for each was exactly identical. Again, copies of the claims were obtained, and it was determined that attachments to each claim for the entire month were merely photocopies of a list of services and dates showing Dr. Beltangady's provider number as being the rendering physician (Exhibit 8).

The Texas Department of Mental Health and Mental Retardation (TDMHMR) was contacted with a request

for all documents that had been filed by DePelchin Children's Center regarding its application for a state license to operate a private mental hospital (Exhibit 9).

On April 5, 1988 Investigator Charles Hafer and I went to Houston to conduct a field investigation. Upon arrival Charles Hafer and I went to DePelchin Children's Center where we met with Susan Blair, the current administrator. Ms. Blair was not familiar with nor involved in the Medicaid billing procedures. She had very little information for us. We advised Ms. Blair that we would need to look at numerous medical records. She did agree to provide them for our review (Exhibit 10).

Investigator Hafer and I then met with Robert E. Barker, the chief executive officer of DePelchin Children's Center. Mr. Barker could not explain why DePelchin Children's Center billed Medicaid and received $16,095.51 for services listed as having been provided by Dr. Beltangady during December 1987, when Dr. Beltangady had not been a physician at the center since August 1984. Mr. Barker advised us of a formula, which he stated was unknown to him, that was utilized by Mr. Larry Cash when submitting claims to NHIC for payment. (Exhibit 11). At this point, Mr. Barker asked whether he should confer with legal counsel before answering any other questions. We were unable to obtain any further specific information.

On April 6, 1988 at about 9:30 a.m. Investigator Hafer and I met with the executives of the DePelchin Children's Center. Those present at the meeting were Robert Barker, Susan Blair, Martha Mayberry, Dr. Robert McKelvey, Larry Cash and corporate attorney, Jimmy Sledge. The stated purpose of the meeting was

to inform Mr. Hafer and me about the organization and how it functions. However, no information significant to the investigation was obtained. Rather, the meeting appeared to be an effort by the organization to determine our level of knowledge concerning the investigation.

After the meeting with the executives, Mr. Hafer and I began examining the inpatient records of the Medicaid recipients residing at the DePelchin Faith Home. Susan Blair obtained the medical records for the Medicaid recipients billed for during December 1987. Wile comparing these records to the recipient histories, Investigator Hafer and I found evidence of some services being provided to the recipients. However, the services that were listed in the medical records were not indicated of the services listed on the claims. The medical records indicated only weekly group therapy sessions by non-supervised social workers and psychologists, as well as a few other non-covered services. The services listed on the claims all indicate direct psychotherapy by Dr. Beltangady three times per week. Mr. Hafer and I photocopied all documents provided to us in reference to the thirty-one paid claims, as it pertained to any treatment actually received by those recipients during December 1987 (Exhibit 12 - 42).

While examining these records, we discovered a total of fifty services billed that could not have been provided to three different recipients, because the recipients had been discharged from DePelchin Children's Center prior toe December 1987: Garcia discharged on 10/19/87 (Exhibit 19); Dean discharged 09/04/87 (Exhibit 15); and Bates discharged 11/24/87 (Exhibit 14). Another recipient who was discharged on December 15, 1987

was listed as receiving services after that date; Dolan (Exhibit 17). Nevertheless, DePelchin Children's Center sent in claims stating that services had been provided to these four recipients through December 31, 1987. For the month of December 1987 a total of thirty-two claims were filed. Thirty-one were paid, encompassing a total of 434 services which came to $16,095.51 (Attachment A. Once again, the explanation of services attachments to all the claims were photocopies of the same list of services (Exhibit 8).

After examining and copying records, Investigator Hafer and I met with Dr. Robert McKelvey. Mr. Sledge was also present during the interview. Dr. McKelvey became the Medical Director at DePelchin Children's Center subsequent to Dr. Beltangady's serving in that capacity. Dr. McKelvey stated that he did not examine the contents of Medicaid claims. Dr. McKelvery stated that he had nothing to do with Medicaid billing procedures for submitting claims. He simply signed the claims brought to him by Larry Cash's business office (Exhibit 43).

Texas Medicaid regulations provide that all claim forms must be signed by the provider or his/her authorized representative. Dr. McKelvey was neither a Medicaid provider nor an authorized representative of the provider group. Additionally, the provider's signature certifies that the information contained on the claim form is true and accurate, and that he is aware that any false claims may be prosecuted under applicable federal and state laws.

Mr. Hafer and I then interviewed Larry G. Cash. Mr. Sledge was present again. Mr. Cash stated that he had not been involved in setting up the Medicaid billing

procedures, but that he merely followed the same process that had been set up by Mark Rhoads. Mr. Cash referred several times to the term "bill averaging". Also, he referred to a "formula" that was utilized to determine what was billed. He would not state, however, what factors the formula contained. Mr. Cash did state that he was familiar with the Medicaid Provider Procedures Manual. Mr. Cash stated that on at least one occasion he had spoken with Richard McMahan, an NHIC Representative, but the situation with bill averaging was never discussed. Mr. Cash also stated that when Valerie Cormier-Bergenon became the NHIC Representative for DePelchin Children's Center he met with her on only one occasion, but he did not recall when or why. Mr. Cash was asked about the four discharged recipients for whom DePelchin Children's Center billed during December 1987. Mr. Cash stated that it was a "clerical error" (Exhibit 44).

Next Mr. Hafer and I met with Mark Rhoads, the former Business Manager for DePelchin Children's Center. Mark Rhoads came to DePelchin Children's Center to speak with us at Mr. Cash's request. Mr. Rhoads advised us that Dr. Beltangady, Mr. Barker, and Ms. Marsha Herderson were involved with him in procuring the provider status for the physician group and that these people were also respondible for designing the "formula" by which Medicaid would be billed. Mr. Rhoads was asked whether he would write down the "formula" that was utilized. He declined, stating that he didn't remember exactly what the "formula" was. As previously mentioned, Robert Barker denied knowledge of the "formula" (Exhibit 11). Dr. Beltangady also denied knowledge of the "formula", as well as the "bill averaging" procedure (Exhibit 11 & 48). Marsha

Henderson told us she was not permitted to participate in the third party billing process, or any discussions pertaining to the formula or bill averaging (Exhibit 50).

In the Spring of 1982, Mr. Rhoads trained Mr. Cash as to how the third party billing was set up. Mr. Rhoads did state that Mr. McMahan of NHIC was never informed of the "formula" or the "bill averaging" technique used to bill Medicaid (Exhibit 45).

On April 25, 1988 Mr. Hafer and I interviewed Valerie Cormier-Bergenon, the current NHIC Representative for DePelchin Children's Center. Ms. Bergenon stated that the only person from DePelchin Children's Center that she had ever met with was Larry Cash. She reported that Mr. Cash did attend NHIC Workshops on Medicaid billing and never gave the impression that he did not understand the procedures. Ms. Bergenon was not aware of DePelchin Children's Center's averaging procedure (Exhibit 46).

Then Mr. Hafer and I met with Richard L. McMahan, the first NHIC Provider Representative to meet with associates of DePelchin Children's Center. The only person that Mr. McMahan could remember meeting with was Larry Cash. Mr. McMahan did inform us that after our visit to DePelchin Children's Center, Mr. Cash had called him and asked Mr. McMahan whether he could recall any conversation regarding Medicaid services (Exhibit 47).

On May 6, 1988 Mr. Hafer and I talked with Dr. Beltangady at her current place of employment, Institute of Living, 400 Washington, Hartford, Connecticut. Dr. Beltangady stated that she left DePelchin Children's Center on August 31, 1984. She also stated that while

she was there she never received any monies of any kind from NHIC. Mr. Beltangady was on salary as a part-time employee, and after her resignation from DePelchin Children's Center never received any type of financial compensation from DePelchin for any reason.

Dr. Beltangady informed us that Marsha Henderson and Robert Barker were responsible for setting up the Medicaid procedures and processing the billings. Dr. Beltangady stated that when the Medicaid claims were sent to her, she never reviewed or corrected them. She simply signed them as they were brought to her. As such, she stated she was not aware of the billing "formula" or the "bill averaging".

Dr. Beltangady also stated that she was not aware the DePelchin Children's Center had continued to use her Medicaid provider number after she left their employ. Dr. Beltangady had made no provision to cancel her Texas Medicaid provider number. She explained that she would hold, on the average, one hour of individual psychotherapy and one hour of group psychotherapy per child per week, but not with other physicians' patients. She also stated that all other therapy would be performed by social workers without physician supervision (Exhibit 48).

On May 17, 1988 I interviewed Marsha Hoobler (Henderson) by telephone at her place of employment in Atlanta, Georgia. Ms. Hoobler related that she had not been privileged to information pertaining to third party billing. She was told to "leave it alone" by Mr. Robert Barker.

After the initial interview with Ms. Hoobler, she contacted Investigator Hafer on two other occasions, via

telephone, and related other information to him (Exhibit 50). Ms. Hoobler informed Mr. Hafer that a consultant had been hired by DePelchin Children's Center to assist them in obtaining their JCAH accreditation. The consultant was Dr. Carl Pfeifer from San Antonio, Texas.

On May 23, 1988 Investigator Hafer and I met with Dr. Pheifer at the Southwest Neuropsychiatric Institute at 8535 Tom Slick Drive, San Antonio, Texas. Dr. Pfeifer advised us that he was called in to assist DePelchin Children's Center with the JCAH accreditation but not to help set up the third party billing. (Exhibit 51).

On May 27, 1988 at approximately 8:15 a.m. Investigator Charles Hafer interviewed Paula J. Hayman by telephone. Ms. Hayman was the Assistant Director for Residential Services at DePelchin Children's Center. When Ms. Hayman was contacted by Mr. Hafer she stated that it was "about time" someone looked into the working of DePelchin. Ms. Hayman stated that the medical records were a problem as far as billing was concerned. This was brought to the attention of Dr. McKelvey by Ms. Hayman on several occasions; however, Dr. McKelvey did nothing to see that problems were corrected. Ms. Hayman did attend several meetings with Dr. McKelvey, Mark Rhoads, Robert Barker and others to discuss methods to maximize funding and to determine "rate increases" (Exhibit 52).

Information from 1099's for the years 1982 through 1988 was obtained showing that DePelchin Children's Center (Group Number Z000PM923) had only one individual provider listed as having performed any service: Dr. Shamal Beltangady, P08876271. The

claims and income information recorded since the enrollment date of January 21, 1982 is broken down as follows:

Year	Amount	Number of Claims
1982	$ 38,878.19	99
1983	$ 50,359.10	122
1984	$ 73,126.49	135
1985	$106,583.48	236
1986	$121,125.26	306
1987	-0-	-0-
1988	$ 16,090.51	32

*(paid 04/15/88 for services dated December 1987)

In September 1986 the "spell of illness" regulation became effective and the NHIC bulleting was released explaining "spell of illness". Larry Cash stated during an interview that he had interpreted the regulation to say that if a patient was considered an "inpatient", DePelchin Children's Center could bill for no more than thirty days. It is our belief that this regulation caused DePelchin Children's Center to suspend their billing practices until December 1987.

Upon examination of provider documentation, it was discovered that during December 1987 no active Medicaid providers in the Medicaid program were even on staff at DePelchin Children's Center. Therefore, Medicaid funds obtained from NHIC, as a result of the filing of Medicaid claims for December 1987, were obtained fraudulently. The following evidence summarizes the fraudulent scheme:

1. Dr. Beltangady was listed as the providing physician after she left the employ of DePelchin Children's Center;

2. There were no Medicaid providers at the facility to provide the services billed to Medicaid;

3. All claims were "bill averaged", instead of actual, as required by state regulation;

4. Fifty of the services listed for four recipients could not have been provided at all because the recipients already had been discharged;

5. Medical records did not substantiate the claims for services rendered;

6. Dr. McKelvey, who signed the claims, was not authorized to do so;

7. Witness statements indicate knowledge of the scheme on the part of all three named suspects.

According to 1099 information from January 21, 1982 to the present, DePelchin Children's Center has filed 930 claims and received $406,168.00. Exception is taken to the entire amount for the following reasons;

1. Claims were submitted based upon an illegal "bill averaging" concept not indicative of what services were actually performed;

2. Services that were provided were performed by someone other than an authorized Medicaid provider (in most instances psychologists and/or social workers);

3. Witness statements indicate knowledge of and participation in either the development or the furtherance of the billing scheme on the part of all three suspects.

IV. ATTORNEY RECOMMENDATION

Recommendation

The investigation of this Medicaid provider has revealed the existence of a fraudulent billing scheme utilizing Dr. Shamal Beltangady's Medicaid provider number without her consent or knowledge. The scheme involves a bill averaging formula resulting in billing for services not rendered. The investigation has identified nine hundred thirty claims for services not provided, totallling an overpayment of $406,168.00.

Evidence gathered by Investigator Harkey will support criminal prosecution, as well as administrative sanction. Criminal prosecution is appropriate under both federal and state fraud and theft statutes. Criminal prosecution is appropriate as to both the corporate entity and the individuals involved. Administrative action is appropriate under the Texas Administrative Code (TAC), the Civil Monetary Penalties Law (CMPL), and the False Claims Act (FCA).

Analysis of witness statements and existing documentation indicates fraudulent billing scheme was developed, initiated and conducted by high managerial agents of the corporate entity, in behalf of the corporation, and within the scope of their employment. The evidence

reveals that the Business Director, Larry Cash, prepared or directed the preparation of false claims. The Medical Director, Dr. Robert McKelvey, signed these false claims. The Medical Director, Dr. Robert McKelvey, signed these false claims knowing he was not an authorized Medicaid provider. The Executive Director, Robert Barker, directed and authorized the development, initiation and conduct of the fraudulent scheme carried out by the business and medical directors.

I recommend this case be presented for criminal prosecution to the Harris County Criminal District Attorney's Office. I also recommend this report be forwarded to the Office of Inspector General for consideration

of application of CHPL and FCA, and to the Texas Department of Human Services (TDHS) for administrative sanction.

Analysis

This section pertains to both criminal prosecution and administrative sanction. Theories of criminal prosecution, together with a discussion of evidence supporting each theory will be presented. Administrative violations will be considered and discussed in cursory fashion.

Criminal Prosecution

The evidence compiled by this investigation reveals a third party (Medicaid) billing scheme designed, implemented and conducted by high

managerial agents of the DePelchin Children's Center corporation. These high managerial agents, made up or the executive director, the business director and the medical director, in designing, implementing and executing this scheme, acted within the scope of their employment and in behalf of the corporation. The corporation thus becomes criminally responsible for the conduct of these individuals. Notwithstanding corporate criminal liability, these individuals remain criminally responsible for their own conduct just as if these crimes had been committed in their own behalf.

The fraudulent scheme uncovered involves billing for services which were never actually provided. The claim forms submitted contained a Medicaid provider number belonging to a physician who had not been employed by the company for several years. The signature on the claims was not that of an authorized Medicaid provider. And certain Medicaid recipients had even been discharged from the facility prior to the dates of services billed to Medicaid.

To varying degrees, the testimonial and documentary evidence collected is sufficient to link each suspect to knowledge and participation in the fraudulent scheme. Moreover, their job functions dictate some knowledge and participation, both jointly and separately, as a natural consequence of their employment. Nevertheless, because of the understandable unwillingness of the suspects to divulge more complete details, the organizational flow of paper in the claims preparation process was not

fully developed. Therefore, it is important to note that this information must be more fully developed by means of grand jury investigation of employees of the DePelchin Children's Center, Inc. The employees of the company were not cooperative to the extent that they were questioned regarding the actual processing and preparation of Medicaid claims, the persons specifically involved therein, and the knowledge of each of those persons regarding the development, initiation and furtherance of the billing process.

Theft, P.C. Sec. 31.03, V.T.C.A.

The evidence compiled by this investigation reveals a third party billing scheme designed and implemented to unlawfully appropriate money from the Medicaid program, without the effective consent of the National Heritage Insurance Company (NHIC).

The consent here is rendered ineffective by virtue of DePelchin's failure to comply with several Medicaid regulations, to-wit:

1) the service must be actually provided;
2) the service must be provided by an authorized Medicaid provider; and
3) the claim form must not contain any false information.

Although absent a confession, intent to deprive must be inferred from the circumstances, the overwhelming evidence of the falsity of the claims is sufficient to prove the intent to defraud element in this case. The boldness

of the scheme and its complete contradiction of Medicaid regulations suggests no other hypotheses.

The appropriation of property is easily shown through proof of payment by NHIC. The custodian of records can identify each claim and correlate it with each payment.

Securing Execution of Document by Deception, P.C. Sec. 32.46, V.T.C.A.

The evidence presented by this investigation unveils a billing scheme purposefully designed and implemented to secure the execution of payment checks by NHIC to DePelchin, thereby affecting the pecuniary interest of NHIC.

The scheme is so deceptive in its construction, that it cannot reasonably be viewed as anything other than an intentional plan to defraud the Medicaid program. Claims were submitted according to a formula, for services which were not provided, using the Medicaid provider number of a physician who was not even employed by the company. Furthermore, the claim was signed by a person not authorized as a Medicard provider, nor even a member of the Medicaid authorized "group".

Tempering with Governmental record, P.C. Sec. 37.10, V.T.C.A.

The evidence uncovered by this investigation brings to light a billing scheme conceived to defraud, the core of which requires the submission of false governmental records.

It is important to understand at this juncture that the health insurance claim forms, submitted by DePelchin to NHIC, are "governmental records" by reason of the fact that they are required by law to be kept for information of government. This means that they are not a governmental record "per se" at the time of falsification, but they become governmental records by their making, presentation and use by DePelchin for the purpose of obtaining Medicaid money.

The facts herein reveal a complex arrangement between the executive director, the business director and the medical director to defraud the Medicaid program by the intentional and knowing falsification and use of documents intended to be taken as governmental records. The executive director, bearing criminal responsibility for the conduct of the business and medical directors which he supervised, participated in the conception and development of the fraudulent billing scheme. Further, he authorized implementation of the scheme by the business director knowing that the "formula" required the business director to include false information; and knowing that the medical director, who was not an authorized Medicaid provider, had to sign the false claims prior to their submission.

The business director was responsible for preparation of the Medicaid claims, and supervision of clerical staff whose duties involved the preparation of the Medicaid claims. It is highly unlikely that the clerical staff took it upon themselves, without direction from their supervisor, to reproduce identical copies of the explanation of services for attachment to each claim. It is very telling if the medical director is to be taken at his word, that the explanation of services was not attached to the claim form until after he signed it.

The medical director, knowing he was not a Medicaid provider, signed each false claim. Moreover, there is some evidence by a previous employee that the medical director not only participated in meetings concerning the billing scheme, but that he was told of the problem of billing for Medicaid services not being provided.

Administrative Sanction

Texas Administrative Code
The evidence reveals TDHS rules violations of 40 T.A.C. Sec. 79.2105 (1), (2), (3), (6), (11), (21), (22), (24), and (26):

> (1), (2), and (3) can be proved by the testimony of Shamal Beltangady regarding the unauthorized use of her Medicaid provider number by DePelchin Children's Center, and her testimony that she never provided the services for which DePelchin billed Medicaid.
>
> (6) and (11) can be proved by evidence of DePelchin billing for services not provided, to-wit: billing for Monday, Wednesday and Thursday psychotherapy sessions regardless of whether they were provided, and submitting claims with identical photocopied explanation of services. These violations may also be proved by evidence of an unauthorized signature on the claims.
>
> (21), (22) (23), (24), and (26) can be proved by both evidence of DePelchin's false billing scheme together with the patient medical records which fail to support the services claimed.

Each such violation would, standing alone, allow for total recoupment of all overpayments identified by this investigation.

Civil Monetary Penalties Law and False Claims Act

The facts presented herein will justify the imposition of CMPL, 42 U.S.C. Sec. 231. The elements of proof required for either action are substantially similar to those indicated and discussed under both the criminal statutes cited and the administrative code regulations cited. The evidence necessary to a successful proceeding is highlighted in the discussions of the criminal and administrative violations set out above.

Venue

Venue is appropriate for state prosecution in either Harris County, Texas, where the falsification took place, or Travis County, Texas, where the claims were filed and paid.

Venue is appropriate for federal prosecution in either the Southern District of Texas, where the falsification took place, or the Western District of Texas, where the claims were filed and paid.

The investigative findings herein, together with this recommendation, address only the events, claims and services actually reviewed (included as an exhibit hereto), and, excepting statistical projections, if any, do not address any other events, claims or services, or other aspects of this provider's participation in the Texas Medical Assistance program.

V. RECAPITULATION

A. Number of incorrect claims/entries: 930

B. Amount of overpayments/ misappropriations/ adjustments: $406,163.03

C. State criminal limitation runs on earliest claim: 01/01/84

D. Federal criminal limitation runs on earliest claim: 01/01/86

VI. ATTACHMENTS

A. Schedule of Incorrect Claims (Attachment A for December 1987 only)

B. __ List of Report Exhibits

C. List of Witnesses

Investigator: /s/ Bruce w. Harkey on (illegible)
Bruce W. Harkey

Supervisor: /s/ John E. Bottoms on June 22, 1988
John E. Bottoms

Attorney: /s/ Thomas H. Vasquez on June 22, 1988

Disposition: _____ on _____
06/21/88
emm/lb